Supreme Court U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1998

RITA GLUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), Congress's power "to regulate Commerce * * * among the several states" (U.S. Const. art. I, § 8, cl. 3), includes the authority to create the national domestic-relations crime of "interstate domestic violence" contained in the Violence Against Women Act of 1994, 18 U.S.C. § 2261(a)(1).

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 154 F.3d 49. The opinion of the district court denying the motion to dismiss the indictment (App., *infra*, 5a-17a) is reported at 953 F. Supp. 854.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1998, and a timely petition for rehearing was denied on November 20, 1998 (App., *infra*, 29a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution, the Violence Against Women Act of 1994, and Title 18 are set forth at App., *infra*, 30a-35a.

STATEMENT

A. *Lopez* And The Violence Against Women Act of 1994

In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court ruled that the Gun-Free School Zone Act of 1990, 18 U.S.C. § 922(q)(1)(A), which made it a crime knowingly to "possess a firearm at any place that the individual knows, or has reasonable cause to believe, is a school zone," exceeded Congress's authority under the Commerce Clause. In holding that the possession of firearms near schools does not "substantially affect" interstate commerce, the Court emphasized that the statute: (1) did not regulate commercial activities; (2) involved the federal government in areas of traditional state authority (criminal law and education); (3) lacked a jurisdictional element that might show a connection to interstate commerce; (4) was not supported by any congressional findings; and (5) could be upheld only by resort to rationales that, if accepted, would obliterate the "distinction between what is truly national and what is truly local." 514 U.S. at 559-68.

On September 13, 1994, several months before the oral argument in *Lopez*, President Clinton signed into law the Violent Crime Control And Law Enforcement Act of 1994, Pub. L. No.

103-322, 103d Cong., 2d Sess., 108 Stat. 1796. Among other things, Title IV of the bill, otherwise known as the Violence Against Women Act ("VAWA"), created the new federal crime of "interstate violation of [a] protection order" (18 U.S.C. § 2262), authorized appropriations to assist state and local governments in their efforts to combat violent crimes against women (42 U.S.C. § 3796gg *et seq.*), and created a new private right of action for victims of crimes of violence "motivated by gender" (*id.* § 13981).

VAWA also created a new federal crime of "interstate domestic violence" (18 U.S.C. § 2261(a)(1)):

> CROSSING A STATE LINE. — A person who travels across a State line * * * with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished * * * .

The statute defines "spouse or intimate partner" broadly to include any spouse or former spouse, anyone "who shares a child in common with the abuser" or "cohabits or has cohabited with the abuser as a spouse," and "any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides." 18 U.S.C. § 2266. "Bodily injury" includes "any act, except one done in self-defense, that results in physical injury or sexual abuse." *Ibid.* A "crime of violence" is an offense that (1) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (2) "is a felony * * * that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 16. Violations of Section 2261(a)(1) are punishable by fines and imprisonment ranging from "not more than five years" (if no serious bodily injury occurs and no dangerous weapon is used) to life imprisonment "if death of the victim results." *Id.* § 2261(b)(1).

B. The Proceedings Below

1. On April 7, 1996, a New Jersey police officer patrolling an industrial office park happened upon a grisly scene: he found

a man, later identified as Vladimir Zelenin, dumping human body parts into the Passaic River. App., *infra*, 6a; C.A. Jt. App. 60. A recent arrival from Kyrghistan, Zelenin worked at ECI Technology, Inc. ("ECI"), a high-tech company located in a nearby office building. Forensic tests would later reveal that Zelenin's victim was Yakov Gluzman, a renowned biologist and medical researcher who held a passive ownership stake in ECI and who had extended a loan to Zelenin so that the immigrant could pay off a relative who was threatening to turn Zelenin in for making false statements to the Immigration and Naturalization Service. App., *infra*, 6a; Tr. 738-39. After his arrest, Zelenin confessed through a Russian interpreter to murdering and dismembering Yakov Gluzman. Fearing that he might receive the death penalty, Zelenin also told authorities that he had committed the crime at the instigation and with the assistance of petitioner Rita Gluzman, Yakov Gluzman's wife. *Ibid.*; Tr. 1117, 1180-1183.[1]

According to Zelenin's story, Rita Gluzman, who was ECI's president, "approached him approximately one month earlier to enlist him in the murder of her estranged husband." App., *infra*, 6a. The Gluzmans had been undergoing a divorce. *Ibid.* According to Zelenin, on April 6, 1996 he went to petitioner's home in Saddle River, New Jersey and drove with her the few miles across the border to Pearl River, New York, where Mr. Gluzman maintained a separate apartment. *Ibid.*; *id.* at 47a-48a (reproducing maps of area). Zelenin and petitioner then allegedly attacked and killed Yakov Gluzman when he entered his apartment.

On April 12, 1996, petitioner, who had no prior criminal record, was arrested by New York authorities. App., *infra*, 7a. Six days later, federal prosecutors interceded and charged her with the crime of "interstate domestic violence" under 18 U.S.C. § 2261(a)(1), and conspiracy to commit that offense. App., *infra*, 7a; C.A. Jt. App. 126. A federal grand jury later returned a two-

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[1] The Gluzmans had been public figures for several years in the early 1970s, when Rita Gluzman, after emigrating to Israel from the Soviet Union, secured the release of her husband from Soviet authorities by engaging in a highly publicized campaign for his freedom. See *Analysis of Jews in Soviet Disputed*, N.Y. TIMES, Nov. 11, 1971, at A12; T. HAYS, SEVERED RELATIONS 86-89 (1998).

count indictment charging the same two offenses. In superseding indictments, the government added two counts of unlawful electronic surveillance (18 U.S.C. § 2511), and one count of travel in furtherance of extortion (*id.* § 1952). App., *infra*, 5a n.1; C.A. Jt. App. 23-28. Petitioner, who has consistently maintained her innocence, moved to dismiss the Section 2261(a)(1) and conspiracy counts, contending that Congress lacked the constitutional authority to make "interstate domestic violence" a federal crime.

2. On January 16, 1997, the district court denied the motion to dismiss. App., *infra*, 5a. It acknowledged that "[t]he legislative history of VAWA contains little express consideration of section 2261 and the impact on interstate commerce of traveling across state lines to commit domestic violence." *Id.* at 8a. It also conceded that "gender-based violence, particularly when it is targeted against women, was clearly the primary concern to Congress." *Id.* at 10a. The court nevertheless concluded that Congress was also concerned about domestic violence generally and had a "rational basis" for enacting Section 2261(a)(1). *Id.* at 9a-10a.

The district court rejected petitioner's argument that more exacting judicial review of Section 2261 was required under *Lopez*. App., *infra*, 10a-14a. It explained that Congress may regulate three categories of activity under the Commerce Clause: "(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce, * * * ; and (3) intrastate activities that have a substantial relation to interstate commerce." *Id.* at 10a. *Lopez*, the court reasoned, "was concerned *only* with the third category of activity, and did not purport to affect Congress' exercise of its commerce power with regard to the regulation of the use of the channels or instrumentalities of commerce." *Id.* at 10a-11a (emphasis added). The district court accordingly refused to consider petitioner's claim that Section 2261(a)(1) fails to pass muster under *Lopez* because it does not regulate a commercial or economic activity, intrudes on several areas of traditional state authority (criminal law and domestic relations), is unsupported by congressional findings, and can be justified only by accepting rationales that would obliterate the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. The district court upheld the

statute on the strength of this Court's pre-*Lopez* cases referring to Congress's "authority to keep the channels of interstate commerce free from immoral or injurious uses." App., *infra*, 12a (citations and internal quotations omitted).

3. At trial, the government's case rested largely on the testimony of Zelenin, the man who had admitted to killing Yakov Gluzman (and who, the government conceded, had lied to investigators about his role in the crime, Tr. 2633). On April 30, 1997, petitioner was convicted on the VAWA, conspiracy, and unlawful electronic surveillance counts but acquitted of extortion. App., *infra*, 18a-19a. She was sentenced to a concurrent term of 60 months on the conspiracy and electronic surveillance counts, and to life imprisonment on the VAWA count. *Id.* at 20a. At her sentencing, she told the judge: "Your Honor, I did not do it and I still say that in front of the world. I did not." 4/30/97 Tr. 18.

4. The Second Circuit affirmed. App., *infra*, 1a-4a. The court rejected petitioner's contention that the statute "'targets' non-commercial activity in a manner unlike any previous federal criminal statute upheld under the Commerce Clause," explaining that it had recently rejected a "similar challenge to 18 U.S.C. § 2262," a "parallel provision in the VAWA * * * which makes it a federal crime to cross a state line with the intent of violating a protective order." App., *infra*, 2a (citing *United States* v. *Von Foelkel*, 136 F.3d 339, 341 (2d Cir. 1998)). Because "[t]here is no reason to view [Gluzman's] claim any differently," the Second Circuit reasoned, Section 2261(a)(1) is "a constitutional exercise of Congress's commerce power." *Id.* at 2a. In reaching that result, the court of appeals expressly "adopt[ed] the holding and analysis set forth" in the district court's opinion. *Ibid.*

5. Petitioner sought panel and en banc rehearing, noting that the Fourth and Sixth Circuits were considering en banc whether companion provisions of VAWA exceed Congress's Commerce Clause authority. See *Brzonkala* v. *Virginia Polytechnic Inst.*, 132 F.3d 949, 977 (4th Cir. 1997) (involving 42 U.S.C. § 13981), vacated and reh'g en banc granted (Feb. 5, 1998); *United States* v. *Page*, 136 F.3d 481 (6th Cir.) (involving 18 U.S.C. § 2261(a)(2)), vacated and reh'g en banc granted, 143 F.3d 1049 (1998). The Second Circuit denied rehearing. App., *infra*, 29a.

REASONS FOR GRANTING THE PETITION

This case offers the Court a valuable opportunity to resolve deep confusion in the lower courts concerning the meaning of *United States* v. *Lopez*, 514 U.S. 549 (1995), as well as to answer a question of surpassing national importance: Does Congress's power "to regulate Commerce * * * among the several states" (U.S. Const. art. I, § 8, cl. 3), include the authority to regulate in an area that the Justice Department has described as "[f]amily and domestic relations law" (see App., *infra*, 38a), by creating the unprecedented federal crime of "interstate domestic violence"? As Judge Michael Luttig of the Fourth Circuit has correctly noted, "the Commerce Clause challenge to [VAWA] * * * pristinely presents the [Supreme] Court with the logical next case in its considered revisitation of the Commerce Clause." *Brzonkala*, *supra*, 132 F.3d at 977 (dissent). This case is the ideal vehicle by which to address this critical, recurring issue.

Petitioner Rita Gluzman is the first *woman* convicted in the United States of violating the criminal proscriptions of the Violence *Against Women* Act. She is currently serving a sentence of life imprisonment for the murder of her husband, Yakov Gluzman, which occurred not in a federal enclave but wholly within the boundaries of New York State. Like every other State of the Union, New York makes homicide a crime; and petitioner no doubt would have been prosecuted by New York authorities (who had her in custody when the federal charges against her were brought) were it not for a random circumstance of her case: according to the jury, she crossed the New Jersey-New York border on the way to the crime scene. See App., *infra*, 47a-48a (reprinting maps). Under VAWA, that purely fortuitous circumstance apparently transformed her crime from a state murder case beyond the reach of federal authority into a full-blown federal offense warranting the involvement of the national government.

In the courts below, petitioner challenged VAWA's novel crime of "interstate domestic violence" as exceeding Congress's Commerce Clause authority under *Lopez*. She pointed out that Section 2261(a)(1) "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise" (514 U.S. at 561); it "criminalizes conduct already denounced as criminal by the States" and thus "effects a change in the sensitive

relation between federal and state criminal jurisdiction" (*id.* at 561 n.3 (citations and internal quotations omitted)); it works a further, even greater incursion upon traditional state authority because "[t]he whole subject of the domestic relations of husband and wife * * * belongs to the laws of the States and not the laws of the United States" (*Ex parte Burrus*, 136 U.S. 586, 593-94 (1890)); it is unsupported by any formal legislative findings; and it is premised on a theory of how violence between spouses or others in intimate relationships affects interstate commerce that is indistinguishable, in its far-reaching implications, from the government's discredited "costs of crime" and "national productivity" arguments rejected in *Lopez*.

The Second Circuit brushed aside all of these objections, reasoning that *Lopez* is completely irrelevant to congressional enactments that regulate either the "channels" or the "instrumentalities" of interstate commerce (as opposed to wholly intrastate activities that "substantially affect" interstate commerce). In the Second Circuit's view, *the mere inclusion of an interstate travel element* in Section 2261(a)(1) suffices to establish the statute's constitutionality. That cramped reading of *Lopez*, we submit, is not just erroneous, but representative of a pronounced tendency in the lower courts (albeit one strongly criticized in numerous dissents) to restrict *Lopez* to its facts and relegate its guiding principles to a quaint footnote in this Court's Commerce Clause jurisprudence. Further review is warranted to make clear the meaning of *Lopez* and define Congress's Commerce Clause authority to create federal crimes in the area of domestic relations.

I. The Constitutionality Of VAWA Under The Commerce Clause Is A Recurring Issue Of National Importance That Has Produced Sharp Disagreement

Whether Congress exceeded its authority under the Commerce Clause in enacting VAWA is an issue that has produced sharp disagreement in the lower courts and among the many academic commentators who have addressed it. Two circuits — the Fourth and Sixth — are now considering the issue en banc in cases involving provisions of VAWA other than Section 2261(a)(1). Given the obvious national importance of the issue, the widespread disagreement it has engendered, and the fact that the opposing

arguments have been fully ventilated in judicial opinions and academic commentary, the issue is ripe for this Court's review.

A. *The Conflicting Views*. Judges and commentators have disagreed over the constitutionality of VAWA. At least three federal judges and one United States Magistrate have concluded that the statute exceeds Congress's authority under the Commerce Clause. In *United States* v. *Wright*, 965 F. Supp. 1307, 1309-16 (D. Neb.), rev'd, 128 F.3d 1274 (8th Cir. 1997), cert. denied, 118 S. Ct. 1376 (1998), Magistrate Judge Thalken concluded that 18 U.S.C. § 2262(a)(1), which criminalizes crossing a state line with the intent to violate a protective order (and then violating such an order), exceeds Congress's Commerce Clause authority. The court engaged in a "careful analysis" of *Lopez*, reasoning that Section 2262 "'is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 965 F. Supp. at 1310, 1315 (quoting *Lopez*, 514 U.S. at 561). The court rejected the government's contention that interstate travel of any kind constituted "interstate commerce," explaining that "[t]here are many ways to cross state lines without moving in the channels of interstate commerce." *Id.* at 1314. Notably, the court also *expressly disagreed* with the district court's decision in this case. *Id.* at 1311 (explaining that district court in this case had "misconstrued Congress's power to legislate pursuant to the Commerce Clause, as limited by *Lopez*") (footnote omitted). Judge Shanahan subsequently agreed with the magistrate judge's analysis, conclusions, and criticisms of the district court's decision in this case. *Id.* at 1308 & n.1 ("disagree[ing] with the analysis found in *Gluzman*" and explaining that "[a]n interstate movement does not necessarily involve or otherwise have an impact or effect on interstate commerce").[2]

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[2] The Eighth Circuit reversed the district court, reasoning that Section 2262(a)(1) "falls within Congress's authority 'to keep the channels of interstate commerce free from immoral and injurious uses.'" 128 F.3d at 1276 (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917)). Other courts have similarly rejected Commerce Clause challenges to VAWA. *E.g.*, *United States* v. *Bailey*, 112 F.3d 758, 765-66 (4th Cir.) (involving 18 U.S.C. § 2261(a)(2)), cert. denied, 118 S. Ct. 240 (1997); *Doe* v. *Hartz*, 970 F. Supp. 1375, 1409-23 (N.D. Iowa 1997) (42 U.S.C.

Sitting en banc, the Fourth and Sixth Circuits are now considering the constitutionality of two provisions of VAWA other than Section 2261(a)(1). In *Brzonkala* v. *Virginia Polytechnic Inst.*, 935 F. Supp. 779 (W.D. Va. 1996), rev'd, 132 F.3d 949 (1997), vacated and reh'g en banc granted (Feb. 5, 1998), the Fourth Circuit is assessing whether VAWA's private right of action for gender-motivated violence, 42 U.S.C. § 13981, exceeds Congress's authority under the Commerce Clause. And in *United States* v. *Page*, 136 F.3d 481 (6th Cir.), vacated and reh'g en banc granted, 143 F.3d 1049 (1998), the Sixth Circuit is considering whether a related VAWA criminal provision, 18 U.S.C. § 2261(a)(2) (see App., *infra*, 30a-31a), violates the Commerce Clause, along with other issues of statutory construction.

In *Brzonkala* both District Judge Kiser and Circuit Judge Luttig concluded, on the basis of a thorough analysis, that VAWA exceeds Congress's Commerce Clause authority. 935 F. Supp. at 785-93; 132 F.3d at 974-78 (dissent). Judge Luttig criticized the panel majority's contrary conclusion as based on a "manifest misreading of the Supreme Court's historically significant *Lopez* decision." *Id.* at 974; *id.* at 976-77 (criticizing majority for failing even to mention "the economic or noneconomic character of the legislation," which determines whether a "quite different constitutional analysis" should be applied, and for abdicating its duty "to undertake an independent review of the relationship between the regulated activity and interstate commerce").[3]

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§ 13981), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998); *Doe* v. *Doe*, 929 F. Supp. 608, 612-17 (D. Conn. 1996) (same); note 3, *infra*.

[3] Others judges have expressed serious doubts about VAWA's constitutionality. See *Page*, 136 F.3d at 490 (Wellford, J., concurring) ("[F]or the reasons stated in the *Brzonkala* dissent, the constitutionality of VAWA is subject to serious question."); *Seaton* v. *Seaton*, 971 F. Supp. 1188, 1190-91, 1193 (E.D. Tenn. 1997) (in "quite reluctantly" upholding VAWA's civil rights provision against Commerce Clause challenge, registering "extreme discomfort with the sweeping nature of VAWA"); *Anisimov* v. *Lake*, 982 F. Supp. 531, 541 (N.D. Ill. 1997) (acknowledging "substantial ground for difference of opinion" about the proper resolution of the Commerce Clause issue).

A remarkable number of academic commentators have analyzed whether VAWA is a valid exercise of Commerce Clause authority. Here again, the conclusions have been mixed. Many have taken the view that VAWA is unconstitutional under the Commerce Clause. See, *e.g.*, Renshaw, *Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act*, 47 EMORY L.J. 819, 841 (1998) (VAWA is "susceptible to an easy constitutional attack"); McKinley, *The Violence Against Women Act After* United States v. Lopez*: Will Domestic Violence Jurisdiction Be Returned To The States?*, 44 CLEVELAND ST. L. REV. 345, 347 (1996) (same); Philpot, *Violence Against Women And the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 771, 800 (1996) (same). Other commentators have reached the opposite conclusion.[4]

The issue has been thoroughly addressed by courts and commentators alike. There is no reason to wait, nor anything to be gained by further percolation of the issue. For reasons we explain below, the pending en banc cases offer much less favorable vehicles than this case for addressing the Commerce Clause issue and the meaning of *Lopez*. See pages 19-21, *infra*.

B. *The Recurring Nature of the Issue.* The validity of VAWA under the Commerce Clause is an issue that arises with great regularity. The issue could arise in *any* civil action — whether in federal or state court — that includes a claim for damages based on gender-motivated violence under 42 U.S.C. § 13981; see *id.* § 13981(e)(3) (granting state courts concurrent jurisdiction over such claims).[5] It could also arise in *any* federal

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[4] See, *e.g.*, Leasure, *Commerce Clause Challenges Spawned by* United States v. Lopez *Are Doing Violence to the Violence Against Women Act (VAWA): A Survey of Cases and the Ongoing Debate Over How the VAWA Will Fare In the Wake of* Lopez, 50 ME. L. REV. 409, 414 (1998) ("VAWA * * * should survive *Lopez*"); Lemos, *The Violence Against Women Act of 1994: Connecting Gender-Motivated Violence to Interstate Commerce*, 21 SEATTLE U. L. REV. 1251, 1266 (1998) (same).

[5] The large number of recent reported cases involving claims under 42 U.S.C. § 13981 include many where no constitutional objection was raised. See, *e.g.*, *Truong* v. *Smith*, 1998 U.S. Dist. LEXIS 18455 (D.

prosecution under 18 U.S.C. §§ 2261 or 2262.[6] Under Section 2261(a)(1) alone, this is potentially a very large number of cases, because that provision reaches any wife who strikes her husband (or husband who strikes his wife) — at least if the abuser happens to cross a state line for the purpose of engaging in such conduct. In certain parts of the country (such as the New York, St. Louis and Washington, D.C. Metropolitan areas), such interstate travel is so common that these regions may well come to resemble federal enclaves where domestic violence is routinely prosecuted as a federal crime. See *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THE THIRD BRANCH, at 3 (Jan. 1992) (in explaining Judicial Conference's opposition to an early version of VAWA, observing that the bill's "broad definition of criminal conduct is so open-ended * * * that the legislation could involve the federal courts in a whole host of domestic relations disputes"). The recurring nature of the Commerce Clause issue is thus plain.

C. *The National Importance of the Issue.* Even apart from the grant of en banc rehearing by two circuits, the extraordinary public significance of the issue presented is underscored by the fact that Section 2261(a)(1)'s new federal crime of "interstate domestic violence" "plows thoroughly new ground and represents a sharp break with the longstanding pattern of federal * * * legislation." *Lopez*, 514 U.S. at 563 (citation and internal quotations omitted).

Colo. Nov. 19, 1998); *Kuhn* v. *Kuhn*, 1998 WL 673629 (N.D. Ill. Sept. 16, 1998); *Comardelle* v. *Pollis*, 26 F. Supp. 2d 897 (E.D. La. 1998); *Dolin* v. *West*, 22 F. Supp. 2d 1343 (M.D. Fla. 1998); *Finley* v. *The Higbee Co.*, 1 F. Supp. 2d 701 (N.D. Ohio 1997); *Palazzolo* v. *Ruggiano*, 993 F. Supp. 45 (D.R.I. 1998); *B.F.* v. *Smith*, 1998 Minn. App. LEXIS 300 (Minn. Ct. App. Mar. 10, 1998); *Bell* v. *Cuyahoga Community College*, 1998 Ohio App. LEXIS 3741 (Ohio Ct. App. Aug. 13, 1998).

[6] In several reported decisions involving such prosecutions, the Commerce Clause issue was not raised. See, *e.g.*, *United States* v. *Casciano*, 124 F.3d 106 (2d Cir.) (18 U.S.C. § 2262(a)(1)), cert. denied, 118 S. Ct. 639 (1997); *United States* v. *Hornsby*, 88 F.3d 336 (5th Cir. 1996) (per curiam) (affirming sentence for conviction under 18 U.S.C. § 2261(a)(2)); *United States* v. *Hayes*, 135 F.3d 133 (2d Cir. 1998) (18 U.S.C. § 2262(a)(1)).

It does so by unleashing federal prosecutors to police an area — the "regulation of domestic relations" — that "has long been regarded as a virtually exclusive province of the States." *Sosna* v. *Iowa*, 419 U.S. 393, 404 (1975).

More than a century ago, this Court explained that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belong to the laws of the States and not the laws of the United States." *Ex parte Burrus*, 136 U.S. at 593-94. That principle has been "consistently recognized" in this Court's cases. *Rose* v. *Rose*, 481 U.S. 619, 625 (1987); see also *Thompson* v. *Thompson*, 484 U.S. 174, 186 n.4 (1988) (referring to "the longstanding tradition of reserving domestic relations matters to the States"); *Sosna*, 419 U.S. at 404 (citing cases); *Santosky* v. *Kramer*, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting, joined by Burger, C.J., White and O'Connor, JJ.) ("[T]he Court has scrupulously refrained from interfering with state answers to domestic relations questions.").[7] As then-Justice Rehnquist explained (*Santosky*, 455 U.S. at 770 (footnote omitted)):

> [F]ew of us would care to live in a society where every aspect of life was regulated by a single source of law * * * . * * * If ever there was an area in which federal courts should heed the admonition of Justice Holmes that 'a page of history is worth a volume of logic,' it is in the area of domestic relations. This area has been left to the States from time immemorial * * * .

Needless to say, if Congress has the power under the Commerce Clause to regulate domestic relations, it also has the power,

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[7] So deeply embedded is this principle that the federal courts have long recognized a "domestic relations" exception to diversity jurisdiction. *Ankenbrandt* v. *Richards*, 504 U.S. 689 (1992). See also *Thompson*, 484 U.S. at 186-87 (refusing to infer an implied right of action under the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A, because that would "entangle" the federal courts "in traditional state-law questions that they have little expertise to resolve"); *Lehman* v. *Lycoming County Children's Servs. Agency*, 458 U.S. 502, 511-12 (1982) (holding that "special solicitude for state interests" in area of family relations requires exclusion from federal habeas of challenges to child custody decisions).

under the Supremacy Clause, to *completely preempt* state authority in this area. *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *McCulloch* v. *Maryland*, 17 U.S. 316, 427 (1819). Yet such a role for the federal government, we submit, would have been unthinkable to the framers.

Notably, the Department of Justice itself initially opposed the enactment of Section 2261, arguing that it was largely unnecessary because the States were already devising new methods to combat domestic violence and because it would involve federal prosecutors

> in a subject-matter area which has traditionally been one of the most decidedly local. *Family and domestic relations law, including its criminal aspects, has always been appropriately left to the states*, and we in the federal government should be most reluctant to federalize it. Moreover, the offense of traveling to commit spousal abuse has as a predicate * * * state law offenses * * * in which local law enforcement officers * * * have a special expertise. There is little practical sense in providing for federal investigations and prosecution of these offenses simply because there has been some inter-state travel in the process, and it is at best a questionable use of limited law enforcement resources.

App., *infra*, 38a-39a (emphasis added); *id.* at 43a ("[F]amily and domestic relations law are fundamentally local in nature, and we question the wisdom of federalizing it."); *id.* at 37a-39a, 44a (describing state progress and innovations in combatting domestic violence).

So great was VAWA's incursion on traditional state authority that an organization of state chief justices took the extraordinary step of publicly opposing the legislation. See Conference of Chief Justices, Resolution X, reprinted in *Crimes of Violence Motivated By Gender: Hearing Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 103d Cong., 1st Sess. 83 (Nov. 16, 1993). The state chief justices explained that "spousal and sexual violence and all legal issues involved in domestic relations historically have been governed by state criminal and civil law." *Ibid.* In addition, "state courts have the primary responsibility for administering a coherent and comprehensive system of civil, criminal, and domestic relations

law and have the structure, experience and procedures for the proper disposition of all cases within their systems." *Ibid.*

Moreover, in *Lopez* itself *every Member of this Court* appeared to endorse the proposition that Congress may not exercise Commerce Clause authority to trench upon traditional state prerogatives in the area of family law and domestic relations. The majority mentioned state authority over matters of "family law" no fewer than four times. 514 U.S. at 564 (rejecting "national productivity" argument on ground that it would permit Congress "to regulate any activity that it found was related to the economic productivity of individual citizens: *family law (including marriage, divorce, and child custody)*, for example") (emphasis added); *id.* at 564-65 (referring to "family law"); *id.* at 565 (same); *ibid.* (referring to "child rearing"). Justice Breyer's dissent, which the remaining Members of this Court joined, emphasized that upholding the statute would not mean that "the Commerce Clause permits the Federal Government * * * to regulate marriage, divorce, and child custody." *Id.* at 624 (internal quotations omitted).[8]

During the oral argument in *Lopez*, which took place less than two months after VAWA was signed into law, Justice Scalia pressed the Solicitor General over whether Congress has the authority under the Commerce Clause to regulate domestic relations:

> COURT: * * * I suppose, under your reasoning, Congress could enact a *Federal domestic relations law* providing a Federal marriage, Federal divorce procedures, and what-not.

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[8] Unfortunately, it is not uncommon for divorce proceedings and child custody disputes to involve allegations of spousal abuse, including charges of domestic violence. Although the Gluzmans had no history of domestic violence in their marriage, the government's basic theory in this case was that the murder of Yakov Gluzman — a single instance of an extreme form of domestic violence — arose out of, and was inextricably linked to, the Gluzmans' ongoing divorce proceeding. Tr. 18-19, 22-24, 27. The government's witnesses included two of Yakov Gluzman's divorce lawyers, who testified at length about the intricacies of New Jersey divorce law, as well as various private investigators who were involved in the divorce proceeding. Tr. 74-113, 131-169, 180-276, 1257-1309.

> I mean, there's nothing that affects levels of crime and levels of education as much as that. Why not?
>
> COUNSEL: Justice Scalia, Congress has legislated, for example, with respect to problems of —
>
> COURT: *Domestic violence, I'm aware. * * * The question is whether it has dealt with them constitutionally.* (Laughter.)

1994 WL 758950, at *15-16 (emphasis added). The Solicitor General never answered Justice Scalia's question, which this case squarely presents: Does Congress have the power, under the Commerce Clause, to create an unprecedented federal *domestic-relations crime*? A federalism issue of greater moment — or more deserving of this Court's attention — is difficult to imagine.

II. The Disagreements Over VAWA's Constitutionality Reflect Widespread Uncertainty Over The Meaning Of *Lopez*

The divergent answers provided by judges and commentators to the question whether VAWA exceeds Congress's Commerce Clause authority hinge, in the end, on different interpretations of *Lopez*. As this Court is no doubt aware, even outside of the VAWA context, *Lopez* has engendered substantial debate and confusion in the lower courts and in the pages of law reviews. This can be readily confirmed merely by "Shepardizing" *Lopez* — an exercise that reveals several hundred citations to opinions distinguishing the case and scores of citations to dissenting opinions. See also Leasure, *supra*, 50 ME. L. REV. at 412 n.21 (noting that *Lopez* has been cited "in over 1300 reported decisions"). For the most part, the lower courts have been extremely reluctant, without additional guidance from this Court, to give full effect to the reasoning of *Lopez*. Because only this Court can rectify this situation and prevent *Lopez* from becoming a dead letter, further review is needed.

A. *The Confusion in the Lower Courts*. Although space will not permit a thorough canvassing of the enormous body of case law and secondary literature on *Lopez*, several major areas of confusion in the case law are apparent. For example, federal judges have differed sharply over the constitutionality of 18 U.S.C. § 922(o), which makes it a crime to possess or transfer a machinegun that was not lawfully possessed before 1986. The

Fifth Circuit has divided 8-8 over this issue. See *United States* v. *Kirk*, 70 F.3d 791 (5th Cir. 1995) (2-1), aff'd, 105 F.3d 997 (per curiam) (en banc) (8-8), cert. denied, 118 S. Ct. 47 (1997). Divided panels of the Third and Sixth Circuits have rejected challenges to the statute based on *Lopez*. See *United States* v. *Rybar*, 103 F.3d 273 (3d Cir. 1996) (Alito, J., dissenting), cert. denied, 118 S. Ct. 46 (1997); *United States* v. *Beuckelaere*, 91 F.3d 781 (6th Cir. 1996) (Suhrheinrich, J., dissenting).

Judges have also reached conflicting conclusions over the constitutionality of the carjacking statute, 18 U.S.C. § 2119. That law has been upheld by divided panels in the Third and Sixth Circuits. See *United States* v. *McHenry*, 97 F.3d 125 (6th Cir. 1996) (2-1) (Batchelder, J., dissenting), cert. denied, 117 S. Ct. 992 (1997); *United States* v. *Bishop*, 66 F.3d 569 (3d Cir.) (2-1) (Becker, J., concurring in part and dissenting in part), reh'g en banc denied, 73 F.3d 23, 23-24 (1995) (Becker, Nygard and Roth, JJ., voting to grant rehearing en banc). Judges have also disagreed over the constitutionality of other statutes. *E.g.*, *United States* v. *Bailey*, 115 F.3d 1222 (5th Cir. 1997) (willful failure to pay child support for child who resides in a different State) (18 U.S.C. § 228) (2-1) (Smith, J., dissenting), cert. denied, 118 S. Ct. 866 (1998); *United States* v. *Wall*, 92 F.3d 1444 (6th Cir. 1996) (operation of an illegal gambling business) (18 U.S.C. § 1955) (2-1) (Boggs, J., concurring in part and dissenting in part), cert. denied, 519 U.S. 1059 (1997); *United States* v. *Wilson*, 73 F.3d 675 (7th Cir. 1995) (Freedom of Access to Clinic Entrances Act) (18 U.S.C. § 248) (2-1) (Coffey, J., dissenting). All of these disagreements reflect divergent readings of *Lopez*.

B. *Perceived Ambiguities in* Lopez. Judges have read *Lopez* in conflicting ways. To give just a few examples, they have disagreed over whether *Lopez* (1) requires courts to make a threshold determination of the commercial nature of the regulated activities (or merely to consider that factor among others), compare *Brzonkala*, 132 F.3d at 971-72 (panel majority) with *id.* at 976 (Luttig, J., dissenting); (2) imposes a heightened form of judicial review or merely reaffirms the propriety of rational-basis review, compare, *e.g.*, *id.* at 965 (majority) with *Wall*, 92 F.3d at 1450 n.13, 1459-60 (Boggs, J., concurring in part and dissenting

in part); and (3) signifies that where Congress does make findings in enacting a statute, the law will readily be upheld.

C. *Lopez-Avoidance in the Lower Courts.* Many lower courts have avoided seriously grappling with the implications of *Lopez* by doing precisely what the Second Circuit did in this case: limiting *Lopez* to cases involving "Category III" statutes (*i.e.*, statutes regulating wholly intrastate activities that "substantially affect" interstate commerce). Under that view, *Lopez* has no relevance whatsoever, and hence can be completely ignored, if the statute under challenge can be characterized as a regulation of the channels (Category I) or instrumentalities (Category II) of interstate commerce. That approach makes no sense doctrinally and interjects serious uncertainty in Commerce Clause jurisprudence.

To begin with, this approach rests on the mistaken premise that these categories are entirely distinct. In fact, Congress — and the courts — can without much difficulty recast or recharacterize a Category III statute that contains a jurisdictional element under either Categories I or II. For example, the crime of possession of a firearm that once moved across a state line arguably could be viewed as a Category III statute (reaching the wholly intrastate conduct of possession) with a jurisdictional element (the gun's prior movement across a state line), or as a Category I or II statute (on the theory that the gun moved in the "channels" of commerce or was a "thing" moving in interstate commerce). Indeed, the government argued in the alternative below that Section 2261(a)(1) qualifies as a Category III statute. U.S. C.A. Br. 44-56.

The rigid, categorical approach to *Lopez* creates powerful incentives for the government, in defending statutes against constitutional challenges, to resort to overbroad interpretations of Categories I and II. For example, the government has persuaded several circuits to uphold the machinegun possession or transfer provision (18 U.S.C. § 922(o)) under Categories I or II. *E.g.*, *Beuckelaere*, 91 F.3d at 784 (stating that Section 922(o) is a regulation of "channels" because "illegal possession of a machine-gun cannot occur without an illegal transfer, which given the national market for machineguns, involves the channels of interstate commerce"); *Rybar*, 103 F.3d at 284 (discussing other cases). But see *Beuckelaere*, 91 F.3d at 788 (Suhrheinrich, J., dissenting) (criticizing this reasoning). The government has also

successfully argued that 18 U.S.C. § 228, which makes it a crime to "willfully fail[] to pay past due support obligations with respect to a child who resides in another state," is a valid regulation of both the "channels" and the "instrumentalities" of interstate commerce — because instrumentalities include "things or persons moving in" interstate commerce and the payment of the child support debt would (if made) involve the sending of money across state lines. *Bailey*, 115 F.3d at 1229-30; but see *id.* at 1238 (Smith, J., dissenting). The government's tactics have spawned considerable confusion in the lower courts. See, *e.g.*, *Wilson*, 73 at 686-88 (noting the "confusion under category two" and declining, "without further guidance from the Supreme Court," to reach novel government arguments about Category II's contours).

Ironically, by convincing courts to adopt overly broad interpretations of the "instrumentalities" and "channels" of interstate commerce, the government has brought about *exactly the opposite* of what *Lopez* was meant to accomplish: it has led to a significant *expansion* of Congress's power under the Commerce Clause. See, *e.g.*, *Bishop*, 66 F.3d at 600 (Becker, J.) (criticizing majority for "dramatically and improperly enhanc[ing] the scope of federal power under [Category II]").

D. *Only This Court Can Clarify* Lopez. The lower courts' uncertainty and reticence in applying *Lopez* to other questionable statutes is hardly surprising. In recent years, this Court has repeatedly instructed the lower courts that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). That admonition, moreover, was recently "reaffirm[ed]" in *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997). Invoking pre-*Lopez* decisions, various courts of appeals have specifically relied on this principle in rejecting Commerce Clause challenges. See, *e.g.*, *Bishop*, 66 F.3d at 588 & n.28; *United States* v. *Rawls*, 85 F.3d 240, 243-44 (5th Cir. 1996); *Kirk*, 105 F.3d at 998-1005 (5th Cir. 1997) (opinion of Higginbotham, J.); *United States* v. *Nguyen*, 117 F.3d 796, 798-99 (5th Cir.) (Jones, J. dissenting), cert. denied, 118 S. Ct. 455 (1997). Accordingly,

this Court's intervention is needed if *Lopez* is not to be confined to its facts.

III. This Case Is An Ideal Vehicle To Clarify *Lopez* And Address The Federalization Of Traditional State Crimes

This case would also allow the Court to define, incrementally, the outer boundary of Congress's criminal lawmaking authority and to address the ongoing federalization of state crimes.

A. *Domestic Violence Is Not "Commercial" Activity Under Any Definition.* Most if not all of the criminal statutes that have produced split decisions since *Lopez* regulate activity that at least arguably is "commercial" in nature (under the broadest understanding of that term). Thus, courts have reasoned that "carjacking is both economically motivated and part of a greater economic activity" involving networks of "chop shops." *Bishop*, 66 F.3d at 581. The unlawful possession or *transfer* of machineguns under 18 U.S.C. § 922(o) has been deemed to involve "the market in machineguns" and "the interstate trafficking in machineguns." *United States* v. *Rambo*, 74 F.3d 948, 952 (9th Cir.), cert. denied, 519 U.S. 819 (1996). And operating an illegal gambling business is plainly a form of economic activity. See also *United States* v. *Sage*, 92 F.3d 101, 105-06 (2d Cir. 1996) (concluding that Child Support Recovery Act regulates commercial or economic activity and obligations), cert. denied, 519 U.S. 1099 (1997). Unlike all of these statutes, Section 2261(a)(1) of VAWA has nothing to do with commercial activity. It therefore can be upheld as a proper exercise of congressional power only by converting the Interstate Commerce Clause into an "Interstate Clause." *Bailey*, 115 F.3d at 1237, 1239 (Smith, J., dissenting).

B. *Section 2261(a)(1) Provides the Best Vehicle Under VAWA.* VAWA created several new "domestic-relations" crimes (18 U.S.C. §§ 2261, 2262) as well as a private right of action for victims of "gender-motivated" violence (42 U.S.C. § 13981). For at least four reasons, a case involving Section 2261 is a far better vehicle for resolving the Commerce Clause issue than is a case (such as *Brzonkala*) involving Section 13981. *First*, Section 2261 is a *criminal* provision and thus implicates this Court's admonition that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relations

between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (citation and internal quotations omitted); cf. *Brzonkala*, 132 F.3d at 970-71 (Section 13981 "displaces no state criminal law" and is "a civil rights law, a quintessential area of federal expertise").

Second, Section 2261 more clearly intrudes on traditional state authority in the area of domestic relations than does Section 13981. Section 2261 is limited to "crimes of violence" that are committed by spouses and others involved in intimate relationships. See 18 U.S.C. § 2266. Section 13981, in contrast, provides a remedy for all "crimes of violence motivated by gender," even when committed by a co-worker, acquaintance or stranger. Moreover, Section 13981 does not cover all or even most instances of domestic violence. It is instead restricted to violence "motivated by gender" (*i.e.*, violence motivated "at least in part" by "animus based on the victim's gender"). 42 U.S.C. § 13981(d)(1). Section 13981 also minimizes the interference with traditional state authority by providing that it shall not "be construed * * * to confer on" the federal courts "jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." *Id.* § 13981(e)(3), (4).

Third, the legislative record relating to Section 2261 (for what it is worth) is much less detailed than it is for Section 13981. See *Brzonkala*, 132 F.3d at 965-67 & n.10 (majority) (describing extensive congressional discussion of problems associated with gender-motivated violence). As the district court recognized below, "[t]he legislative history of VAWA contains little express consideration of section 2261 and the impact on interstate commerce of traveling across state lines to commit domestic violence." App., *infra*, 8a; pages 28-29, *infra*.

Fourth, any case involving Section 13981 is likely to require this Court to address not only the Commerce Clause question but also the alternative basis on which that provision's constitutionality is defended by the government: Section 5 of the Fourteenth Amendment. This case, in contrast, stands or falls solely on the answer to the Commerce Clause question.

Finally, although the Sixth Circuit in *Page* is now considering a Commerce Clause challenge to Section 2261(a)(2), that case was

resolved by all three judges on the panel on an issue of statutory construction (whether the domestic violence must occur during or after, rather than before, the interstate travel), and it is likely to be resolved on that basis by the en banc court as well. *Page* is thus almost certain to be a very poor vehicle for reviewing the constitutionality of VAWA.

C. *This Court Should Address the Ongoing Federalization of State Law Crimes.* "Since the 1970s, Congress has vastly increased the federal government's jurisdiction over crime," largely by "criminaliz[ing] a variety of activities traditionally considered to be purely state matters." Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499, 499 (1996); AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998) ("ABA REPORT") ("More than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.") (footnote omitted) (emphasis omitted). Even before Congress enacted the 1994 Crime Bill — which included VAWA's crime of "interstate domestic violence" and many other newly minted federal offenses, there were well in excess of 3,000 federal criminal laws on the books. ABA REPORT, at 94.

Some of these new federal crimes have been created in response to a single, sensational event that received widespread publicity. See ABA REPORT, at 11-12. Others, of which the provision involved in this case may well be an example, appear to be well-intentioned but purely symbolic (if VAWA's architect is to be believed). App., *infra*, 40a n.2 (quoting statement of Sen. Biden) ("I hear commentators on television * * * saying, 'Well, will this stop violence against women * * * ?' The answer is no, that is not my intention. My intention is * * * to change the nation's attitude."); J. JACOBS & K. POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 65 (1998) (noting the "proliferation of hate crime laws in the 1980s and 1990s" and arguing that such laws "are symbolic statements requested by advocacy groups for material and symbolic reasons and provided by politicians for political reasons").

Needless to say, the widening gyre of federal criminal jurisdiction has had a major impact on the federal courts' work-

load. Between 1980 and 1998, the number of criminal cases filed in the federal courts more than doubled (from 27,968 to 57,691). Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving The Federal Judiciary From The Federalization of State Crime*, 43 U. KAN. L. REV. 503, 505 (1995); Rehnquist, *The 1998 Year-End Report on the Federal Judiciary*, at 13 n.2 (1999). As the workload of the federal courts rises, less time is available for resolving federal-law cases and issues of truly national importance.

Various Members of this Court have long urged Congress to exercise greater restraint in the creation of new federal offenses. See, *e.g.*, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THE THIRD BRANCH, at 2 (1992) (describing impact of "the caseload crisis on the federal courts" as "serious"); Roman, *Justices Hammer Needless Laws*, WASH. TIMES, Feb. 19, 1992, at A4 (quoting Justice O'Connor's testimony that federalization of "what traditionally were state crimes is going to have a deleterious effect on the court system as a whole"). Most recently, the Chief Justice warned (*1998 Year-End Report*, *supra*, at 4):

> The pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas * * * . Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be. State courts do, and can, and should handle such problems.

Every plea from this Court for greater restraint has fallen on deaf ears in the halls of Congress. This is plainly an area where the political checks of federalism have completely broken down. Miner, *Federal Court Reform Should Start At The Top*, 77 JUDICATURE 104, 105 (1993). Even after *Lopez*, Congress has continued to expand the catalogue of federal crimes. See ABA REPORT, at 92-93 n.3 (citing numerous crimes created in 1997-98); *id.* at 11 ("An estimated 1,000 bills dealing with criminal statutes were introduced in the most recent Congress.") (footnote omitted); Baker and Lewis, *Clinton Proposes Child Abuse Initiative, Program Includes Tougher Federal Penalties in Cases of Violence or Murder*, WASH. POST., Dec. 30, 1998, at A3.

This case offers an especially good vehicle to address the federalization of state law crimes because it is, at bottom, a straightforward murder case. Every State in the Union makes homicide a crime. This Court long ago identified murder as a crime generally punishable by the States and not by the federal government. See *United States* v. *Cruickshank*, 92 U.S. 542, 553-54 (1875) ("It is no more * * * within the power of the United States to punish for a conspiracy to * * * murder within a State, than it would be to punish for * * * murder itself."); *Cohens* v. *Virginia*, 19 U.S. 264, 426 (1821) ("Congress has the right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the states"). That view has been affirmed in recent years by several Members of this Court. See, *e.g.*, *1991 Year-End Report*, *supra*, at 3 (explaining that the "federalization of virtually all murders" would be "inconsistent with long-accepted concepts of federalism"); Bonner, *The Federalization of Crime: Too Much of a Good Thing?*, 32 U. RICH. L. REV. 905, 907 n.14 (1998) ("'Murder is not a federal crime; murder of the president is.'") (quoting congressional testimony by Justice Scalia).

Moreover, the interstate travel element in Section 2261(a)(1) bears no logical relationship to the harm targeted by the law — crimes of violence in intimate relationships. App., *infra*, 40a (Justice Department analysis) ("The essence of the proscribed conduct is the act of spousal abuse itself * * * , not the interstate travel."). The travel is a fortuitous and incidental fact added to the criminal provision as an excuse for federalizing yet another traditional state crime. But as Judge Friendly has queried:

> Why should the federal government care if * * * a New York pimp chooses Newark, N.J., rather than Nyack, N.Y., as the place where his employees transact their business? If the house is in Nyack, why is the United States interested because the [prostitutes] have traveled over the George Washington bridge and thence through New Jersey although it would not be if they crossed the Hudson over the New York thruway?

H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 58 (1973) (footnote omitted); see also Buckley, *Federalism and the Scope of Federal Criminal Law: Introduction*, 26 AM. CRIM. L. REV. 1737, 1738-39 (1989) ("There is something inherently

haphazard about criminal laws that depend on the often fortuitous crossing of a state line."). This feature of Section 2261(a)(1) also warrants the Court's review.

D. *This Case Illustrates Federalism's Vital Role in the Protection of Individual Rights*. This case also merits review because it dramatically illustrates the important role of federalism in providing a "double security * * * to the rights of the people." 514 U.S. at 576 (Kennedy, J., joined by O'Connor, J., concurring) (internal quotation omitted). According to one account of petitioner's trial (based on interviews with the prosecutors), federal prosecutors brought this case in order to deprive petitioner of rights and protections she would have had under New York law (but lacked under federal law). See T. HAYS, SEVERED RELATIONS 38, 66, 68, 264-65, 270 (1998); C.A. Jt. App. 531; N.Y. Crim. Proc. L. § 60.22 (1998) ("[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense"); *People* v. *Diaz*, 227 N.E.2d 860 (N.Y. 1967). These protections were important because the government's case was built almost entirely on the testimony of an alleged accomplice. See page 5, *supra*.

IV. The Decision Below Is Incorrect

Finally, review should be granted because the decision below is erroneous. The lower courts were wrong to conclude that *Lopez* is completely irrelevant to Section 2261(a)(1), that Section 2261(a)(1) is constitutional, and that a contrary holding would cast doubt on the validity of a host of other federal crimes.

A. Lopez *Cannot Be Ignored Simply Because A Law Falls Within Categories I or II*. The Second Circuit was of the view that *Lopez* is completely irrelevant to congressional enactments relating to the "channels" (Category I) or "instrumentalities" (Category II) of interstate commerce. App., *infra*, 2a, 10a-13a. That conclusion was mistaken (though symptomatic of a broader judicial trend of *Lopez*-avoidance). Although this Court in *Lopez* did initially take note of the three categories and went on to make clear that neither Category I nor Category II could be a basis for defending the statute under review, it hardly follows that the Court's entire analysis in *Lopez* has no bearing on regulations of "channels" or

"instrumentalities." The government has provided no good reason, and there is none, why this Court's fundamental concerns in *Lopez* over Congress's use of the Interstate Commerce Clause to regulate activity that is noncommercial and that traditionally has been regulated by the States should not apply with equal force to regulations of the channels or instrumentalities of interstate commerce. And, as previously explained (at 17-18), the Second Circuit's approach is also flawed because it assumes, incorrectly, that the three categories are hermetically distinct and because it has spurred the lower courts, at the government's urging, to adopt overly broad definitions of "channels" and "instrumentalities" (thereby *expanding* Congress's Commerce Clause power).

The courts below were simply wrong to equate the mere crossing of a state line with the *use* of the *channels* of interstate *commerce*. See *Bailey*, 115 F.3d at 1238 n.12 (Smith, J., dissenting) (rejecting suggestion that "any person moving to another state * * * 'utilizes' the channels of interstate commerce, merely by crossing a state line"). The lower court's approach effectively transforms the Interstate Commerce Clause into an "Interstate Clause." *Id.* at 1237, 1239.

This Court's decision in *Caminetti* v. *United States*, 242 U.S. 470 (1917), which involved the Mann Act, is not to the contrary.[9] The broad statement in *Caminetti* (quoted in passing in *Lopez*, 514 U.S. at 558) that Congress's "authority * * * to keep the channels

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[9] The Mann Act made it a crime, among other things, to "knowingly transport or cause to be transported * * * in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any immoral purpose." In *Caminetti*, this Court, by a 5-3 vote, refused to read the phrase "for any immoral purpose" as restricted to commercialized vice, rejecting arguments based on (1) the maxim of ejusdem generis; (2) the Mann Act's official title (the "White Slave Traffic Act"), underlying purpose, and legislative history; and (3) the need to avoid the constitutional issue that a contrary construction would raise. 242 U.S. at 484-92. In rejecting a Commerce Clause challenge to Caminetti's conviction for transporting a woman with the immoral purpose of making her "his mistress and concubine," the Court relied on an earlier Mann Act case involving prostitution. *Id.* at 491-92 (citing *Hoke* v. *United States*, 227 U.S. 308 (1913)).

of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to serious question" (242 U.S. at 491) must be read in context. The Court was there referring to Congress's settled power under the Commerce Clause to regulate "[t]he *transportation* of *passengers* in interstate commerce." 242 U.S. at 491 (emphasis added). In fact, the Court in *Caminetti* clearly stated: "It may be conceded, for purpose of the argument, that Congress has *no* power to punish one who travels in interstate commerce *merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey*." *Ibid.* (emphasis added). Even if *Caminetti* could have been interpreted more broadly prior to *Lopez*, it simply cannot be so interpreted today. 514 U.S. at 564, 566 (stressing that Constitution does not create a "general federal police power"); *id.* at 567 (declaring that while "broad language" in Court's prior opinions "has suggested the possibility of additional expansion, * * * we decline here to proceed any further").[10]

The text and structure of the Constitution confirm that the Commerce Clause was never intended to be a font of broad

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[10] After various Members of this Court voiced serious misgivings about *Caminetti* — *e.g.*, *Cleveland* v. *United States*, 329 U.S. 14, 20-21-22, 28 (1946) (separate opinions of Black, Jackson, Rutledge, and Murphy, JJ.) (involving Mormon polygamists) — the Justice Department adopted a policy against prosecution in noncommercial cases unless the victims were minors. See DOJ MANUAL § 9-79.000 (1997); D. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 237-38 (1994). *Caminetti* and the early record of Mann Act enforcement in noncommercial cases have been harshly criticized. D. LANGUM, *supra*, at 9, 13 (concluding, based on review of Justice Department records, that during 1917-28 unelected federal prosecutors conducted "virtually a morals crusade" and "used the Mann Act as a club against blacks who dated white women and defendants who espoused unpopular political beliefs"); Graglia, United States v. Lopez*: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 736 n.108 (1996) (*Caminetti* "illustrates that the conventional citation of Wickard v. Filburn, 317 U.S. 111 (1942), as the extreme of federal intrusion into local matter is mistaken" because "*Wickard* at least involved commerce, federal regulation of the nation wheat market; *Caminetti* involved illicit romance").

authority to federalize traditional state crimes of violence by persons who happen to cross state lines. The so-called "Domestic Violence Clause" of Article IV, which authorizes federal intervention to deal not only with insurrections (like Shays' Rebellion) but also with problems of pervasive violence within the States, is carefully calibrated and requires as a precondition to federal intervention a proper request from a State. See U.S. Const. art. IV, § 4 ("The United States shall * * * protect each of [the States] against Invasion; *and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*") (emphasis added); *Yazoo City Post Office Case*, 8 Op. Atty Gen. 489, 1857 U.S. AG LEXIS 55, at *10-*11 (1857) (stating that "domestic violence" in Article IV encompasses "robbery, burglary, arson, rape, and murder, by wholesale"); Bybee, *Insuring Domestic Tranquility:* Lopez, *Federalization of Crime, and The Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 34, 39 (1997) (explaining that the delegates to the Constitutional Convention "refused to substitute the term 'insurrections' for 'domestic violence'" and arguing that this refusal was consistent with the broader view of the Domestic Violence Clause as "cover[ing] not only direct threats to the government's authority, but actions that indirectly threatened the government by challenging its ability to protect its citizens"). As Professor Bybee's exhaustive review of the history of the Domestic Violence Clause shows, that provision supplies "independent reinforcement for the step the Court took in *Lopez* to rein in congressional attempts to federalize crime and may even justify closer scrutiny of such legislation." 66 GEO. WASH. L. REV. at 5. It would be odd indeed if Congress could employ the Commerce Clause to do an end run around the careful limits of the Domestic Violence Clause.[11]

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[11] The records of the Constitutional Convention also suggest that the framers did not believe that the mere crossing of a state border, without more, could give rise to criminal jurisdiction under the Commerce Clause. In the debates over Congress's proposed power to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States" (U.S. Const. art. I, § 8, cl. 10), Gouverneur Morris unsuccessfully argued that this authority be "extend[ed] * * * farther, so as to provide for the punishment of counterfeiting in general." 2 THE

B. *Section 2261(a)(1) Is Unconstitutional.* Section 2261(a)(1)'s crime of "interstate domestic violence" does not regulate a commercial or economic activity; it regulates violent crime, pure and simple. And just as in *Lopez*, this statute indisputably trenches on two areas of traditional state authority (here, criminal law and domestic relations). It is, in short, an unprecedented federal incursion on an area of traditional state authority. As such, it warrants heightened judicial scrutiny.

Section 2261(a)(1) cannot possibly survive such scrutiny. Congress made no formal findings concerning the need for such legislation or the connection between interstate travel for the purpose of engaging in domestic violence and interstate commerce.[12] The district court's reliance (App., *infra*, 9a-10a) on generalized statements in the legislative reports accompanying VAWA about the impact of domestic violence on the national economy is at odds with *Lopez*. The only statement in the legislative reports specifically relating to Section 2261(a) amounts to a policy argument about why the provision is a good idea, not an explanation for why it is a proper exercise of Congress's constitutional powers. See S. Rep. No. 138, 103d Cong., 1st Sess. 62 (1993) (stating that Section 2261 "does not constitute an

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RECORDS OF THE FEDERAL CONVENTION OF 1787, 315 (M. Farrand ed., revised ed. 1966) (Madison, Aug. 17, 1787). He argued that this extension was "necessary" because "[b]ills of exchange for example might be forged in one State *and carried into another*." *Ibid.* (emphasis added). Of course, if mere travel across state lines could provide a sufficient basis for criminal lawmaking under the Commerce Clause, there would have been no need to expand the Counterfeiting Clause to cover this scenario.

[12] At the time VAWA was enacted, the incidence of "intimate homicides" in the United States had in fact been declining. See BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE U.S., INTIMATE HOMICIDE <http://www.ojp.usdoj.gov/bjs/homicide/intimates.htm>. Between 1976 and 1992, the number of victims of intimate homicides fell from 2957 to 2277, a drop of about 23%. The Justice Department had also concluded that the States were doing an effective job of prosecuting and punishing these crimes. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MURDER IN FAMILIES 7 (July 10, 1994).

'overfederalization' of crimes" because "[u]nder title 18 of the United States Codes, there are provisions that make it a crime to cross a State line with falsely made dentures or with a cow").[13] That argument was in turn drawn from Senator Biden's testimony:

> We have got a Chief Justice who, I respectfully suggest, does not know what he is talking about when he criticizes this legislation. * * * . Now, the Chief Justice and others have suggested that the bill may burden the Federal courts unnecessarily. Let me tell you something. We have, under title [18] * * * , provisions making it a Federal crime if you move across a State line with falsely made dentures * * * [or] a cow * * * . * * * If we can take care of cows, maybe the vaunted chambers of the Supreme Court could understand it may make sense to worry about women * * *.

Violence Against Women: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary, 102d Cong., 2d Sess. 7-8 (Feb. 6, 1992).[14]

The government's theory for why Section 2261 is constitutional must also be rejected because (as in *Lopez*) it has virtually no limits. Under the government's view, Congress has the authority to convert *any* traditional state-law crime into a federal offense merely by limiting the class of offenders to those who have crossed a state line. Congress thus could make it a federal crime to litter, or jaywalk, or double-park after traveling across a state line. Congress could also impose criminal penalties for interstate assisted suicide, or interstate sodomy, or interstate gang loitering.

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[13] In an apparent reference to Section 2262's prohibition on traveling across a state line to violate a protective order, the Senate Report also states that VAWA "constitute[s] an appropriate response to the problem of domestic violence which because of their [*sic*] interstate nature, transcend the abilities of State law enforcement agencies." S. Rep. No. 138, at 62. Even if that generalized and wholly unsubstantiated assertion also refers to Section 2261, it would hardly suffice to withstand heightened review under *Lopez*.

[14] Of course, as trivial as they may sound when compared to violent crime, cattle rustling and the distribution of false teeth both clearly *do* involve commerce.

Indeed, if the government's theory is correct, then Congress has the power to create federal crimes that penalize conduct that the States, through their own democratic processes, have chosen to *decriminalize* or *even to protect*. Congress could even make it a crime to engage in conduct protected under state constitutions.

The government's sweeping theory of Commerce Clause power, of course, is not limited to criminal statutes. There is no reason why inclusion of an interstate travel element could not, under the government's view, justify congressional action in other areas of traditional state authority. Thus, Congress could pass laws (1) empowering the Secretary of Education to prescribe the curriculum for any elementary school that purchases textbooks or supplies that have traveled across state lines, or (2) requiring a federal marriage license for any person who travels across state lines to engage in a wedding ceremony. It could even make those laws *preemptive* of state authority. See pages 12-13, *supra*. That cannot be the law.

C. Invalidating Section 2261(a)(1) will not require this Court to strike down other statutes or impair the federal government's ability to fight domestic violence. None of the other criminal statutes whose constitutional fate the district court feared was inextricably linked to Section 2261(a)(1) (see App., *infra*, 11a-12a, 14a-15a) intrudes upon the States' authority over domestic relations; the vast majority (including the Mann Act) target activities that are, in the aggregate, commercial or economic in nature; and those that do not at least directly regulate the *transportation* of goods or persons (and make that transportation the actus reus of the crime). Finally, even without Section 2261(a)(1), Congress would retain exceedingly broad authority under the Spending Clause to underwrite *the States'* efforts to address domestic violence, see *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987), as it has already done in VAWA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1999

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: August 12, 1998
Decided:) August 25, 1998

Docket No. 97-1281

UNITED STATES OF AMERICA,

Appellee,

v.

RITA GLUZMAN,

Defendant-Appellant.

Before: CALABRESI, CABRANES, and STRAUB, *Circuit Judges*.

Appeal from a conviction and sentence on a charge of interstate domestic violence in the United States District Court for the Southern District of New York (Barrington Parker, Jr., *Judge*).

Affirmed.

JUDD BURSTEIN, Burstein & Fass, New York, NY, for *Defendant-Appellant*.

CATHY SEIBEL, Assistant United States Attorney, Southern District of New York, for *Appellee*.

PER CURIAM:

Appellant Rita Gluzman appeals her conviction entered in the United States District Court for the Southern District of New York (Barrington Parker, Jr., *Judge*) on April 30, 1997. Appellant was convicted under the Violence Against Women Act ("VAWA"), 18 U.S.C. § 2261(a) (1994), for the murder of her husband. We affirm.

On April 6, 1996, Appellant and her co-conspirator, Vladimir Zelenin, drove from New Jersey to the New York apartment of her estranged husband, Yakov Gluzman. They entered the empty apartment and awaited Yakov Gluzman's arrival. When he came home late that night, Appellant and Zelenin murdered Yakov Gluzman with axes, then proceeded to dismember his body with the intent of hiding their crime. Zelenin was discovered by a police officer the next day attempting to dump plastic bags filled with Yakov Gluzman's remains into the Passaic River. Following his arrest, Zelenin confessed to his role in the murder and testified against Gluzman during her trial.

18 U.S.C. § 2261 provides, in pertinent part:

> A person who travels across a State line . . . with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished . . . .

18 U.S.C. § 2261(a)(1) (1994). Appellant's main argument is that this statute "targets" non-commercial activity in a manner unlike any previous federal criminal statute upheld under the Commerce Clause. We have recently upheld a similar challenge to 18 U.S.C. § 2262 (1994) — a parallel provision in the VAWA — which makes it a federal crime to cross a state line with the intent of violating a protective order. *See United States v. Von Foelkel*, 136 F.3d 339, 341 (2d Cir. 1998) (per curiam). There is no reason to view Appellant's claim any differently. We therefore adopt the holding and analysis set forth in the admirable opinion of the district court below, finding § 2261 to be a constitutional exercise of Congress's commerce power. *See United States v. Gluzman*, 953 F. Supp. 84 (S.D.N.Y. 1997).

Next, Appellant claims that the jury selection system for the White Plains courthouse in the Southern District violates the Jury Selection and Service Act, 28 U.S.C. § 1869(e). In her jury selection argument, Appellant questions the manner in which jurors are allocated to the White Plains courthouse where her trial was held. White Plains is supplied with jurors from the six suburban counties of Sullivan, Dutchess, Orange, Westchester, Rockland and

Putnam. Although the Bronx is adjacent to Westchester County, in which is located the City of White Plains, no jurors from the Bronx go to White Plains. Appellant argues that this organization of the jury wheel has the unintended consequence of limiting minority representation in the White Plains venire and violates the requirement that jurors must be chosen from "counties . . . surrounding the places where court is held as the district court plan shall determine." See 28 U.S.C. § 1869(e) (1994).

We reject Appellant's suggestion that section 1869(e) must be read literally to require that jurors be drawn only from geographically adjacent counties. It is well-settled that:

> [T]he district and circuit courts have had power since the first Judiciary Act of 1789 to divide a district territorially in the interest of an impartial trial, of economy, and of lessening the burden of attendance. . . There are probably no districts in the Union, which can be divided without disclosing in the sections different racial, religious, political, social or economic percentages. To demand that they shall not, would be a fantastic pedantry which would serve no purpose and would put an end to the statute.

United States v. Gottfried, 165 F.2d 360, 364 (2d Cir. 1948). The disproportionate need for jurors in the Manhattan courthouse readily explains the current administrative boundaries, and there is no merit in Appellant's challenge to them. *See United States v. Yonkers Contracting Co.*, 682 F. Supp. 757, 768 (S.D.N.Y. 1988) (rejecting an identical argument).

Appellant contends that because the cited cases involve jury selections from different judicial districts, they are not determinative of this case. She points out that the Bronx and White Plains are in the same judicial district, and the White Plains courthouse is only a separate division of that district. We do not believe that the previous cases turned on the distinction between districts and divisions, and therefore reject Appellant's contention.

Finally, Appellant also raises a variety of other unavailing claims of prejudicial error. First, she argues that she was entitled to the government's material on Vladimir Zelenin prior to her opening statement. This assertion has no legal basis. The

government is only required to provide such materials before cross-examination, not in advance of opening statements. See 18 U.S.C. § 3500(b). Next, Appellant contends that the government improperly rehabilitated Zelenin through its use of prior consistent statements made by him after his arrest. Appellant cites the decision in *United States v. Tome*, 513 U.S. 150 (1995), which barred the admission of prior consistent statements under Fed. R. Evid. 801(d)(1)(B) when the statement was made after a witness had a motive to fabricate. Zelenin's testimony does not come under 801(d)(1)(B), but Appellant argues that *Tome* should be read to cover prior consistent statements introduced for rehabilitation outside of 801(d)(1)(B). But *Tome* explicitly limited its holding "to the requirements for admission under Rule 801(d)(1)(B)," *see Tome*, 513 U.S. at 167, and we have rejected the reading of Tome Appellant posits. *See Phoenix Assoc. III v. Stone*, 60 F.3d 95, 103 (2d Cir. 1995). Finally, Appellant argues that she was prejudiced by the district court's failure to give the jury a perjury instruction concerning Zelenin.[1] But the charge she proposed was misleading and we conclude that there was no error in omitting the instruction.

The judgment of the district court is affirmed.

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[1] The general credibility instruction given by the district court stated: "Did the witness make false statements under oath? If you find that occurred, you might decide to view that witness' later testimony with care or caution."

APPENDIX B

UNITED STATES OF AMERICA, Plaintiff,
-against- RITA GLUZMAN, Defendant.

96 Cr. 323 (BDP)

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

January 16, 1997, Decided
January 17, 1997, FILED

COUNSEL: Cathy Seibel, A.U.S.A., Diedre M. Daly, A.U.S.A., U.S. Attorney's Office, White Plains, NY, (Attorneys for U.S.A.).

Lawrence Hochheiser, Esq., New York, NY. Michael Rosen, Esq., New York, NY. Diarmund White, Esq., New York, NY, (Attorneys for Defendant).

OPINION:

BARRINGTON D. PARKER, JR., U.S.D.J.

On April 25, 1996, defendant Rita Gluzman ("Gluzman") was indicted for conspiring to commit interstate domestic violence and for committing interstate domestic violence in violation of 18 U.S.C. § 2261 (1996).[1] Gluzman moves to dismiss the indictment on the ground that Congress, when it enacted section 2261, exceeded its authority under the Commerce Clause. See U.S. Const., Art. I, § 8, cl. 3. For the reasons stated below, I find the challenged provision to be a constitutional exercise of Congress' power to regulate interstate commerce. Accordingly, the motion to dismiss is denied.

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[1] Additional charges were brought against Gluzman in superseding indictments dated October 31, 1996, November 14, 1996, and December 12, 1996. Those indictments added charges of illegal interception of oral communications in violation of 18 U.S.C. §§ 2511(1)(a), 2511(4)(a); use of a device to intercept oral communication in violation of 18 U.S.C. §§ 2511(1)(b), 2511(4)(a), and travel in furtherance of extortion in violation of 18 U.S.C. § 1952.

BACKGROUND

The facts as alleged by the government are as follows.[2] In the late morning of April 7, 1996, Police Officer Richard Freeman happened upon Vladimir Zelenin dumping the body parts of Yakov Gluzman, Rita Gluzman's husband, into the Passaic River in New York near ECI Technology, Inc. ("ECI"), a company co-owned by Rita and Yakov Gluzman. Upon this inadvertent discovery, Zelenin, after being advised of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), confessed that he, with the help of his cousin Rita Gluzman, had murdered Yakov Gluzman.

According to Zelenin, an employee of ECI, Gluzman approached him approximately one month earlier to enlist him in the murder of her estranged husband. Apparently, Gluzman told Zelenin that she and her husband were undergoing divorce proceedings as a result of which ECI would shut down and Zelenin would lose his job. Zelenin agreed to assist Gluzman in the murder.

On April 5, 1996, Gluzman allegedly told Zelenin that she wanted to kill her husband the next day, before her husband came to her house to collect some of his belongings. Zelenin stated that on the appointed day, April 6, 1996, he met Gluzman in New Jersey and drove with her to Pearl River, New York, to commit the murder, armed with an ax and a knife. Once in Pearl River, they entered Yakov Gluzman's apartment and awaited his return. When he arrived, Gluzman and Zelenin killed him together. Zelenin then dismembered the body while Gluzman cleaned the apartment of traces of the crime.

Zelenin admits to placing Yakov Gluzman's body parts into plastic bags, which were then loaded into the trunks of a Ford Taurus registered to ECI and Yakov Gluzman's Nissan Maxima. Gluzman and Zelenin drove the two cars to the ECI parking lot, after which Zelenin drove Gluzman to her home in Upper Saddle

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[2] This factual background is gleaned from the complaint filed against Gluzman on April 18, 1996, the affidavits submitted in support of the search warrants of Gluzman's residence and ECI Technology, Inc., a company owned by Gluzman, and the April 25, 1996 indictment.

River, New Jersey. They allegedly agreed that Zelenin would return to ECI and dump the bags filled with Yakov Gluzman's body parts into the nearby Passaic River and then meet later that day at ECI. The discovery of Zelenin by Freeman and Zelenin's subsequent arrest prevented this later rendezvous.

Gluzman disappeared after the murder. On April 12, 1996, personnel at the Cold Spring Harbor Laboratory ("the Laboratory") in Long Island, New York, discovered a trespasser in a cottage on the premises. When Arthur Brings, director of facilities at the Laboratory, approached the trespasser, he recognized her as Rita Gluzman, who he knew from past work-related visits that she and her husband had made to the Laboratory. Later that day, Gluzman was arrested by the Nassau County authorities and charged with burglary of the Laboratory cabin. On April 18, 1996, Gluzman was arrested by federal agents and charged in a federal complaint with conspiracy to violate and a substantive violation of 18 U.S.C. § 2261.

On April 25, 1996, a grand jury returned a two count indictment against Gluzman, charging her with conspiracy to commit interstate domestic violence and the commission of interstate domestic violence. Specifically, the indictment charges that Gluzman both conspired to, and actually did, travel from New Jersey to New York with the intent to murder her estranged husband, and that, once in New York, she murdered him, in violation of 18 U.S.C. § 2261.

Gluzman subsequently brought this motion to dismiss her indictment arguing that section 2261 neither regulates a commercial activity nor contains a requirement that the activity in question be connected to interstate commerce, and therefore its enactment exceeded the authority of Congress to legislate under the Commerce Clause. Gluzman argues that the legislative history of 18 U.S.C. § 2261 does not support Congress' authority to enact the section under the Commerce Clause. She further argues that Congress is limited, under its Commerce powers, to regulating only those activities that have an economic component or that implicate some other attribute of commerce. Consequently, according to Gluzman, the interstate conduct prohibited by section 2261 falls beyond Congress' authority.

DISCUSSION

Since one of Gluzman's principle arguments is that section 2261 is unsupported by its legislative history, we begin with an examination of the pertinent Congressional findings. In September 1994, Congress passed the Violence Against Women Act of 1993 ("VAWA") as part of the larger Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322; see S. Rep. No. 103-138, at 38 (1993). Section 221, Title II of the VAWA (codified as 18 U.S.C. § 2261) contains the challenged provision, which makes it a crime for a person to travel across a state line "with the intent to injure, harass, or intimidate that person's spouse or intimate partner," and "in the course of or as a result of such travel [to] intentionally commit[] a crime of violence causing bodily injury to such spouse or intimate partner." 18 U.S.C. § 2261(a)(1).

The legislative history of the VAWA contains little express consideration of section 2261 and the impact on interstate commerce of traveling across state lines to commit domestic violence. In its discussion of the VAWA generally, however, Congress noted that "our society pays a heavy price for [domestic] violence: 1 million women a year seek medical attention for injuries caused by violence at the hands of a male partner, children in homes with family violence are 15 times more likely to be abused or neglected than children in peaceful homes; and finally, estimates suggest that we spend $ 5 to $ 10 billion a year on health care, criminal justice, and other social costs of domestic violence." S. Rep. No. 103-138, at 41.

In describing the purpose of section 2261, Congress did note that it served to fill the "gaps in the legal protection offered to victims of domestic violence . . . [where] States and localities have not addressed the issue sufficiently." S. Rep. No. 103-138, at 43. The Committee on the Judiciary further stated that it believed that the provisions in section 2261 "constitute an appropriate response to the problem[s] of domestic violence which, because of their interstate nature, transcend the abilities of State law enforcement agencies. The committee's legislation does not constitute an 'overfederalization' of crimes. Under title 18 of the United States Code, there are provisions that make it a crime to cross a State line

with falsely made dentures or with a cow." S. Rep. No. 103-138, at 62.

Gluzman argues, nonetheless, that the legislative history of 18 U.S.C. § 2261 fails to indicate that the statute as finally enacted was based on any findings in that history that the interstate travel in furtherance of spousal abuse was activity that affected interstate commerce. She further contends that section 2261 neither regulates a commercial activity nor contains a requirement that the activity in question be connected to interstate commerce, and therefore its enactment exceeded the authority of Congress to legislate under the Commerce Clause.

The challenged statutory provision arose in an area which Congressional power is exceedingly broad. Indeed, the power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L. Ed. 23 (1824). Thus, "the task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow." *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).

While a court's inquiry when examining the constitutionality of a congressional enactment is an independent one, the court will consider congressional findings, including congressional committee findings. *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 1631, 131 L. Ed. 2d 626 (1995). Where the court determines that the legislators, "in light of facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce," the court's investigation is completed. *Katzenbach v. McClung*, 379 U.S. 294, 304-03, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964); *see also Hodel*, 452 U.S. at 276.

Review of the legislative history of the section, though sparse, indicates that Congress had a rational basis for concluding that the regulation of interstate domestic violence was "reasonably adapted to [an] end permitted by the Constitution." *Hodel*, 452 U.S. at 276. Congress, in enacting section 2261, alluded to the substantial toll of domestic violence on the physical and economic welfare of

individuals directly affected by such violence as well as public generally. See S. Rep. No. 103-138 at 41. Although gender-based violence, particularly when it is targeted against women, was clearly of primary concern to Congress, it was not the exclusive motive for the VAWA in its entirety. As previously noted, when addressing section 2261, the Committee considered, in nongender specific terms, "the health care, criminal justice, and other social costs of domestic violence," S. Rep. No. 103-138, at 41, and crafted what it believed to be an "appropriate response to the problem[s] of domestic violence which, because of their interstate nature, transcend the abilities of State law enforcement agencies." S. Rep. No. 103-138, at 62.

Having determined that a rational basis exists, "the only remaining question for judicial inquiry is whether the 'means chosen by [Congress][are] reasonably adapted to the end permitted by the Constitution.'" *Hodel*, 452 U.S. at 276 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964). Gluzman suggests that the Supreme Court's recent decision in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626, compels the conclusion that they are not.

In *Lopez*, the Supreme Court invalidated the Gun-Free School Zones Act, 18 U.S.C. § 922(q), which prohibited possession of a firearm in a school zone, as beyond the scope of the Commerce Clause. In defining the contours of the Commerce Clause, the *Lopez* Court identified three broad categories of activity that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat comes only from intrastate activity; and (3) intrastate activities that have a substantial relation to interstate commerce. *Lopez*, U.S. at - 115 S. Ct. at 1629-30.

Lopez held that Congress, in enacting 18 U.S.C. § 922(q), exceeded its authority under the Commerce Clause by failing to incorporate a jurisdictional element requiring a commerce nexus and by attempting to regulate local, non-economic activity. *Id.* at , 115 S. Ct. at 1630-31. *Lopez*, however, was concerned only with the third category of activity, and did not purport to affect

Congress' exercise of its commerce power with regard to the regulation of the use of the channels or instrumentalities of commerce.

Unlike the statute at issue in *Lopez*, section 2261 does not regulate purely local activity, but, instead, is an exercise of Congress' power under the first category of cases articulated by the *Lopez* Court — the authority to regulate the use of channels of commerce.[3] Furthermore, the section clearly requires an identifiable interstate nexus, namely, the crossing of a state line with the criminal intent to commit domestic violence against one's spouse and the actual commission of such violence. See 18 U.S.C. § 2261(a). Section 2261 therefore avoids the constitutional deficiencies identified in *Lopez* where the interstate nexus was non-existent and the activity to be regulated was purely local. Thus, whatever limitation *Lopez* may have recognized with respect to congressional power over intrastate activities that may affect commerce, the decision did not speak to the broad power of Congress to regulate the channels of interstate commerce, an area occupied by section 2261 as well as numerous other criminal statutes. See, e.g., 18 U.S.C. § 1073 (criminalizing travel in interstate commerce to avoid prosecution); 18 U.S.C. § 1201 (criminalizing kidnaping if the victim is transported in interstate commerce); 18 U.S.C. § 1952 (prohibiting travel in interstate commerce to carry on certain specified unlawful activities

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[3] Only two other courts have considered the constitutionality of provisions of the VAWA. One challenge was successful, the other was not. *See Brzonkala v. Virginia Polytechnic and State University*, 935 F. Supp. 779 (W.D. Va. 1996) (holding that Title III of the VAWA, 42 U.S.C. § 13981, is an unconstitutional exercise of Congress' power under the Commerce Clause and the Enforcement Clause of the Fourteenth Amendment); *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996) (upholding the constitutionality of 42 U.S.C. § 13981). Both cases, however, deal exclusively with Title III of the VAWA, 42 U.S.C. § 13981, which creates a civil rights remedy for gender-based violence. Section 13981, as both the *Brzonkala* and *Doe* courts recognize, regulates purely intrastate activity and therefore differs analytically from 18 U.S.C. § 2261, which regulates an interstate activity, namely the travel across state lines to commit domestic violence. See 18 U.S.C. § 2261.

including, inter alia, extortion, bribery or arson); 18 U.S.C. § 2314 (prohibiting the transportation or transfer in interstate commerce of stolen property).

Congress' authority "to keep the channels of interstate commerce free from immoral or injurious uses has been frequently sustained, and is no longer open to question." *Heart of Atlanta Motel*, 379 U.S. at 256 (quoting *Caminetti v. United States*, 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917). Thus, courts consistently have upheld federal criminal statutes that regulate the crossing of state lines by persons or things in a manner incident to some criminal activity. See, e.g., *Scarborough v. United States*, 431 U.S. 563, 52 L. Ed. 2d 582, 97 S. Ct. 1963 (1977) (holding that under 18 U.S.C. § 1202(a), a statute criminalizing possession "in interstate commerce or affecting commerce" of a firearm by a convicted felon, proof that the possessed firearm previously traveled in interstate commerce was sufficient to satisfy the required nexus between possession and commerce); *United States v. Hernandez*, 85 F.3d 1023, 1031 (2d Cir. 1996) (upholding Comprehensive Drug Abuse Prevention and Control Act of 1970, 18 U.S.C. § 922(g)(1) and 922(k), which criminalize possession of firearms by felons where the weapon at issue was shipped or transported in interstate or foreign commerce); *United States v. Sirois*, 87 F.3d 34 (2d Cir.), cert. denied, U.S. , 117 S. Ct. 328, 136 L. Ed. 2d 241 (1996) (upholding statute, 18 U.S.C. § 2251(a), penalizing a pornographer if "such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce").

Gluzman contends, nonetheless, that Congress exceeded the scope of its authority under the Commerce Clause by attempting to regulate an activity that was not commercial. According to the defendant, for statutory enactments under *Lopez* categories one and two to pass constitutional muster, such regulations must involve "economic activity" or must expressly require movement "in interstate commerce" as grounds for jurisdiction. In other words, in order to affect the channels of interstate commerce as a basis for regulation, the conduct sought to be criminalized must involve the transportation of something — e.g. pornography or goods — from state to state or at a minimum some other commercial activity that has a clearly identifiable connection with commerce.

While these contentions might carry some weight if the analysis concerns whether local activities substantially affect interstate commerce, they are wide of the mark where, as here, the statute regulates conduct in interstate commerce. Five days after *Lopez* was decided, in *United States v. Robertson*, 514 U.S. 669, 131 L. Ed. 2d 714, 115 S. Ct. 1732 (1995) (per curiam), the Supreme Court reaffirmed the distinction between activities in interstate commerce and local activities that substantially affect interstate commerce. There, the Court concluded that it was not necessary to prove that an Alaskan gold mine "affected" interstate commerce to bring it under the Racketeer Influenced and Corrupt Organizations Act (RICO); it was sufficient merely to prove that the gold mine was an "enterprise . . . engaged in . . . interstate or foreign commerce." 115 S. Ct. at 1733. The Court made clear that "the 'affecting commerce' test was developed [] to define the extent of Congress' power over purely intrastate commercial activities that nonetheless have substantial interstate effect." *Id.* The Court upheld the RICO conviction based on "the interstate activities of Robertson's mine," without considering its local activities. *Id.*

As the Ninth Circuit recently stated, the Supreme Court in *Robertson* "explained that the[] three bases of congressional authority [identified in *Lopez*] are analytically distinct." *United States v. Pappadopoulos*, 64 F.3d 522, 526 (9th Cir. 1995). Thus, to the extent that Congress seeks to regulate persons or things in interstate commerce — as opposed to local activities that affect interstate commerce — its power to do so was not changed by *Lopez*.

It has long been established that Congress can not only regulate activities that involve interstate or international transportation of goods and people, but it can do so "regardless of whether the transportation is motivated by a 'commercial purpose.'" *Sirois*, 87 F.3d at 40 (citing *United States v. 12,000-Ft. Reels of Super 8mm Film*, 413 U.S. 123, 125, 37 L. Ed. 2d 500, 93 S. Ct. 2665 (1973)). Indeed, the regulated activity need not even be commercial in character. *Heart of Atlanta Motel*, 379 U.S. at 256; *Hoke v. United States*, 227 U.S. 308, 320, 57 L. Ed. 523, 33 S. Ct. 281 (1913). "Transactions [may] be commerce though non-commercial; they may be commerce though illegal and

sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electron and information." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 549-50, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944). Congress has long exercised the authority to keep the channels of interstate commerce free from injurious noncommercial uses, including, among others, the transportation of firearms for private use, *Scarborough*, 431 U.S. 563, 52 L. Ed. 2d 582, 97 S. Ct. 1963, pornography for private use, *Sirois*, 87 F.3d 34, liquor for private use, *United States v. Hill*, 248 U.S. 420, 63 L. Ed. 337, 39 S. Ct.143 (1919), and obscene materials for private use. *United States v. Orito*, 413 U.S. 139, 37 L. Ed. 2d 513, 93 S. Ct. 2674 (1973). Thus, the Supreme Court has held that the Commerce Clause empowers Congress to prohibit the importation of obscene material from abroad, even if it is imported for personal use rather than commercial distribution. *See 12,200-Ft. Reels of Super 8 MM Film*, 413 U.S.123. The Court has also upheld the Mann Act's application to interstate transportation of persons for an immoral purpose — polygamy — on the ground that the statute, "while primarily aimed at the use of interstate commerce for the purposes of commercialized sex, is not restricted to that end." *Cleveland*, 329 U.S. 14, 91 L. Ed. 12, 67 S. Ct. 13.

Moreover, this Court cannot glean, as Gluzman urges, any principled distinction between Congress' power to prohibit one from transporting an article or another person and its power to prohibit the use of commerce by the illegal actor herself. Indeed, statutes regulating persons who cross state lines harboring the intent to commit an unlawful activity have consistently been upheld as within Congress' authority under the Commerce Clause.

For example, the Travel Act, 18 U.S.C. § 1952, which makes it a crime to use an interstate facility with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity," has long been upheld as well within Congress' authority to legislate under the Commerce Clause. See, e.g., *United States v. Herrera*, 584 F.2d 1137, 1147 (2d Cir. 1978) (noting that the constitutionality of section 1952 has been repeatedly and unsuccessfully challenged); *United States v. Barrow*, 363 F.2d 62 (3d Cir. 1966), cert. denied, 385 U.S. 1001, 17 L. Ed. 2d 541, 87

S. Ct. 703 (1967); *United States v. Zizzo*, 338 F.2d 577 (7th Cir. 1964), cert. denied, 381 U.S. 915, 14 L. Ed. 2d 435, 85 S. Ct. 1530 (1965); *United States v. Goldberg*, 928 F. Supp. 89, 94-98 (D. Mass. 1996); *see also Hemans v. United States*, 163 F.2d 228 (6th Cir.), cert. denied, 332 U.S. 801, 92 L. Ed. 380, 68 S. Ct. 100 (1947) (upholding the Fugitive Felon Act, which made unlawful the travel in interstate commerce with the intent to avoid prosecution); *United States v. Boone*, 904 F. Supp. 866 (N.D. Ind. 1995) (upholding 18 U.S.C. § 924(m), which prohibits an individual from "traveling from any State or foreign country into any other State" in an attempt to illegally deal in firearms, as a valid exercise of congressional authority under the Commerce Clause). Considering the plenary power afforded to Congress to regulate the channels of interstate commerce, section 2261 certainly falls within the categories of activity that Congress may properly regulate.

Section 2261 has the requisite relation to interstate commerce as defined under controlling law since it is triggered only if an individual crosses a state line with the intent to injure, harass, or intimidate his or her spouse or intimate partner, and that travel actually results in the intentional commission a crime of violence that causes bodily injury to such spouse or intimate partner. See 18 U.S.C. § 2261. As was previously noted, it is a "well settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether physical, moral, or economic in nature. *North Am. Co. v. SEC*, 327 U.S. 686, 705, 90 L. Ed. 945, 66 S. Ct. 785 (1946).[4]

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[4] Gluzman further argues that, in the event that violence against women were determined to provide Commerce Clause jurisdiction, section 2261 could not apply to acts of violence against a husband, and the indictment, in this case, would thus have to be dismissed. In determining the scope of a statute, a court must "look first to [the statute's] language. If the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *Russello v. United States*, 464 U.S. 16, 20, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) (quoting *United States v.*

Gluzman's final argument attacks section 2261 as overbroad, pointing to the legislative history's myriad references to violence against women and the absence of any such references to problems associated with violence against men. She argues that to the extent that gender-based violence does have a genuine effect on interstate commerce, those findings are relevant only to 42 U.S.C. §13981, which establishes a civil rights remedy for gender-based violence. Thus, according to the defendant, 18 U.S.C. § 2261, insofar as it applies to protect "spouses" and is gender neutral, reaches beyond the scope of congressional findings with regard to the effect of gender-based violence on interstate commerce.

Gluzman fails to recognize, however, that in order to succeed in a facial challenge to section 2261, she "must show that 'no set of circumstances exists under which the [section] would be valid.'" *United States v. Sage*, 92 F.3d 101, 106 (2d Cir. 1996) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987); *see Giusto v. I.N.S.*, 9 F.3d 8, 10 (2d Cir. 1993). Thus, even if this Court were to find that section 2261 is unconstitutional as so far as [*sic*] it fails to regulate nongender motivated activity, it would be "insufficient to render the [section] wholly invalid, since the [Supreme] Court has not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." *Sage*, 92 F.3d at 106 (citing *General Electric v. New York State Dep't of Labor*, 936 F.2d 1448, 1456 (2d Cir.1991)).

Turkette, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)). Gluzman's argument ignores the plain language of section 2261 which criminalizes interstate travel with the intent to injure a "spouse" or "intimate partner." The statute is decidedly gender neutral. Only a "'clearly expressed legislative intention' contrary to the . . . [statutory] language, . . . would require [the court] to question the strong presumption that Congress expresses its intent through the language it uses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n. 12, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987). No such contrary language is present in this case. The legislative history recognizes that women are the "most likely target" of gender-based violence, S. Rep. 103-138 at 54, but does not exclude men as potential victims.

CONCLUSION

Based on the above reasons, this Court finds that 18 U.S.C. § 2261 is a constitutional exercise of Congress' power to regulate commerce. Accordingly, the motion to dismiss the indictment is denied.

SO ORDERED

BARRINGTON D. PARKER, JR.

U.S.D.J.

Dated: White Plains, New York

January 16, 1997

APPENDIX C

UNITED STATES DISTRICT COURT
Southern District of New York

UNITED STATES OF AMERICA
v.
Rita Gluzman

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number : 7:96CR00323-001

Judd Burnstein
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) which was accepted by the court.

■ was found guilty on count(s) one (1), two (2), three (3), & four (4) after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. 371	Conspiracy to Commit Murder	04/07/1996	One (1)
18 U.S.C. 2261(a)(1),(b)(1)	Interstate Domestic Violence Resulting in Death.	04/07/1996	Two (2)
18 U.S.C. 2511(1)(a),(4)(a)	Illegal Interception of Oral Communications.	04/06/1996	Three (3)
18 U.S.C. 2511(1)(b),(4)(a)	Use of a Device to Intercept Oral Communications	04/06/1996	Four (4)

The defendant has is sentenced as provided in pages 2 through 6 of this judgment. The Sentence is imposed pursuant to the Sentencing Reform Act of 1984.

■ The defendant has been found not guilty on count(s) Five (5).

☐ Count(s)_____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 131-62-0085

Defendant's Date of Birth: 07/27/1948

Defendant's USM No.: 82050-054

Defendant's Residence Address:

24 Peachtree Place
Upper Saddle River NJ

Defendant's Mailing Address:

24 Peachtree Place
Upper Saddle River NJ

04/30/97
Date of Imposition of Judgment

/s/ Boynton D. Parker, Jr.
Signature of Judicial Officer

Hon. Barrington D. Parker, Jr.
U.S. District Judge
Name & Title of Judicial Officer

April 30, 1997
Date

DEFENDANT: Rita Gluzman
CASE NUMBER: 7:96CR00323-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of ___life___.

The defendant is sentenced to 60 months on Count One (1).
The defendant is sentenced to Life on Count Two (2).
The defendant is sentenced to 60 months on Count Three (3).
The defendant is sentenced to 60 months on Count Four (4).

■ The court makes the following recommendations to the Bureau of Prisons:

The defendant should be incarcerated at F.C.I., Danbury Ct.

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgement as follows:

_____

_____

_____

DEFENDANT: Rita Gluzman
CASE NUMBER: 7:96CR00323-001

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgement.

_____
United States Marshall

By: _____
Deputy U.S. Marshal

DEFENDANT: Rita Gluzman
CASE NUMBER: 7:96CR00323-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised for a term of 5 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

■ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable).

If this judgement imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgement.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

DEFENDANT: Rita Gluzman
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STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

DEFENDANT: Rita Gluzman
CASE NUMBER: 7:96CR00323-001

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 200.00**	**$**	**$**

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

DEFENDANT: Rita Gluzman
CASE NUMBER: 7:96CR00323-001

RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ■ in full immediately; or

B ☐ $___ immediately, balance due (in accordance with C, D, or E); or

DEFENDANT: Rita Gluzman
CASE NUMBER: 7:96CR00323-001

C ☐ not later than _____; or

D ☐ in installments to commence ___ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ (*e.g., equal, weekly, monthly, quarterly*) installments of $_____ over a period of _ year(s) to commence _____ days(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, D.C. 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: Rita Gluzman
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STATEMENT OF REASONS

■ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 43

Criminal History Category: 1

Imprisonment Range: _____ to Life months

Supervised Released Range: 3 to 5 years

Fine Range: $ 25,000.00 to $ 250,000.00

■ Fine waived or below the guideline range because of inability to pay

Total Amount of Restitution: $_____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

DEFENDANT: Rita Gluzman
CASE NUMBER: 7:96CR00323-001

☐ Partial restitution is ordered for the following reason(s):

■ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

APPENDIX D

UNITED STATES COURT OF APPEALS

For The Second Circuit
Unites States Court House
40 Foley Square
New York 10007

Carolyn Clark Campbell
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twentieth day of November one thousand nine hundred and ninety-eight.

USA

v. Dkt No: 97-1281

Gluzman

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Rita Gluzman.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm

APPENDIX E

RELEVANT PROVISIONS OF THE UNITED STATES CONSTITUTION

Art. I, § 8, cl. 3:

The Congress shall have Power * * * to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

Art. IV, § 4:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on the Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Amendment 10:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

RELEVANT PROVISIONS OF THE VIOLENCE AGAINST WOMEN ACT OF 1994

18 U.S.C. § 2261:

Interstate domestic violence

(a) OFFENSES.—

(1) CROSSING A STATE LINE.—A person who travels across a state line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).

(2) CAUSING THE CROSSING OF A STATE LINE.—A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or

fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

(b) PENALTIES.—A person who violates this section shall be fined under this title, imprisoned—

(1) for life or any term of years, if death of the offender's spouse or intimate partner results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the offender's spouse or intimate partner results;

(3) for not more than 10 years, if serious bodily injury to the offender's spouse or intimate partner results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime or territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case, or both fined and imprisoned.

18 U.S.C. § 2262:

Interstate violation of protection order

(a) OFFENSES.—

(1) CROSSING A STATE LINE.—A person who travels across a State line or enters or leaves Indian country with the intent to engage in conduct that—

(A)(i) violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued; or

(ii) would violate subparagraph (A) if the conduct occurred in the jurisdiction in which the order was issued; and

(B) subsequently engages in such conduct, shall be punished as provided in subsection (b).

(2) CAUSING THE CROSSING OF A STATE LINE.—A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud, and, in the course or as a result of that conduct, intentionally commits an act that injures the person's spouse or intimate partner in violation of a valid protection order issued by a State shall be punished as provided in subsection (b).

(b) PENALTIES.—A person who violates this section shall be fined under this title, imprisoned—

(1) for life or any term of years, if death of the offender's spouse or intimate partner results;

(2) for not more than 20 years if permanent disfigurement or life threatening bodily injury to the offender's spouse or intimate partner results;

(3) for not more than 10 years, if serious bodily injury to the offender's spouse or intimate partner results or if the offender uses a dangerous weapon during the offense;

(4) as provided for the applicable conduct under chapter 109A if the offense would constitute an offense under chapter 109A (without regard to whether the offense was committed in the special maritime and territorial jurisdiction of the United States or in a Federal prison); and

(5) for not more than 5 years, in any other case, or both fined and imprisoned.

18 U.S.C. § 2266:

Definitions

In this chapter—

'bodily injury' means any act, except one done in self-defense, that results in physical injury or sexual abuse.

'Indian country' has the meaning stated in section 1151.

'protection order' includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil and criminal courts (other than support and child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.

'spouse or intimate partner' includes—

(A) a spouse, a former spouse, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited with the abuser as a spouse; and

(B) any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State in which the injury occurred or where the victim resides.

'State' includes a State of the United States, the District of Columbia, a commonwealth, territory, or possession of the United States.

'travel across State lines' does not include travel across State lines by an individual who is a member of an Indian tribe when such individual remains at all times in the territory of the Indian tribe in which the individual is a member.

* * *

42 U.S.C. § 13981:

CIVIL RIGHTS

(a) PURPOSE.—Pursuant to the affirmative power of Congress to enact this subtitle under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this subtitle to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

(b) RIGHT TO BE FREE FROM CRIMES OF VIOLENCE.—All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d)).

(c) CAUSE OF ACTION.—A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

(d) DEFINITIONS.—For purposes of this section—

(1) the term "crime of violence motivated by gender" means a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender; and

(2) the term "crime of violence" means—

(A) an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of title 18, United States Code, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction and whether or not those acts were committed in the special maritime, territorial, or prison jurisdiction of the United States; and

(B) includes an act or series of acts that would constitute a felony described in subparagraph (A) but for the relationship between the person who takes such action and the individual against whom such action is taken.

(e) LIMITATION AND PROCEDURES.—

(1) LIMITATION.—Nothing in this section entitles a person to a cause of action under subsection (c) for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender (within the meaning of subsection (d)).

(2) NO PRIOR CRIMINAL ACTION.—Nothing in this section requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action under subsection (c).

(3) CONCURRENT JURISDICTION.—The Federal and State courts shall have concurrent jurisdiction over actions brought pursuant to this subtitle.

(4) SUPPLEMENTAL JURISDICTION.—Neither section 1367 of title 28, United States Code, nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

(5) LIMITATION ON REMOVAL.—Section 1445 of title 28, United States Code, is amended by adding at the end the following new subsection:

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.

OTHER RELEVANT PROVISIONS OF TITLE 18, UNITED STATES CODE

18 U.S.C. § 16:

Crime of violence defined

The term "crime of violence" means —

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property may be used in the course of committing the offense.

APPENDIX F

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

OCT __ 1990 [stamp]

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Biden:

This is to provide the views of the Department of Justice on S. 2754, the Violence Against Women Act of 1990. We wholeheartedly support the prosecution and incarceration of violent offenders against women, but we have serious concerns about this bill as it is currently formulated.

* * *

— **Subtitle B** This subtitle would create a new $200 million grant program under the auspices of the Bureau of Justice Assistance (BJA) to assist states and localities to develop effective law enforcement and prosecution strategies to combat violent crimes against women and to focus efforts on areas with the highest rates of violent crimes against women. The Bureau of Justice Statistics (BJS) would be required within 45 days of enactment to compile a list of the 40 areas with the highest rates of such crimes, to be designated "high intensity crime areas." The bill also authorizes $100 million for "general grants" to state and local governments.

We doubt that these grant programs are necessary, because we already fund programs through our Office for Victims of Crime (OVC) to improve law enforcement and prosecution responses to violent crimes against women. Since grant programs under the Victims of Crime Act (VOCA) began in 1986, all states have used a significant portion of their crime victim assistance formula grant

funds to support direct services to adult and child victims of sexual assault. These programs have included rape crisis hotlines, emergency counseling, child sexual abuse treatment, and other specialized services for sexual assault victims. In addition, numerous law enforcement, prosecutor, mental health, and hospital-based programs have been developed that provide assistance and support to rape victims. OVC has also supported a number of training programs for law enforcement, prosecutors, the clergy, medical, mental health, and victim assistance professionals, all of whom come into contact with victims of sexual assault and abuse.

In addition, states are authorized to use BJA grant funds for these purposes under the Drug Control and System Improvement Grant Program in purpose areas (4) "providing community and neighborhood programs that assist citizens in preventing and controlling crime . . ."; (14) "developing and implementing programs which provide assistance to jurors and witnesses . . ."; and (16) "innovative programs that demonstrate new and different approaches to enforcement, prosecution, and adjudication of drug offenses and other serious crimes."

Crime victim compensation funds at the state level are also steadily increasing as a resource for victims of sexual assault and sexual abuse. Most states now have legislation to address the specific needs of sex crime victims. It is no longer routine in most communities for rape victims to bear the cost of medical examinations.

* * *

Subtitle D This subtitle creates a National Commission on Violent Crime against Women for the purpose of making recommendations for how to reduce violent crime against women. We are sympathetic with the bill's goals in seeking recommendations for reducing such crime, but we believe that a National Commission is unnecessary, since two federal task forces and centralized councils or task forces on domestic violence or violence against women in at least eighteen states have considered

many of these same issues.[1] Indeed, the remainder of this legislation would appear to be premature if enacted prior to creation of such a Commission.

* * *

Title II — Subtitle A This subtitle creates two new federal offenses relating to spousal abuse (interstate traveling to commit spousal abuse and interstate violation of protective orders), provides for mandatory restitution by offenders, and requires states to give full faith and credit to protection orders entered by another state. We have no objection to the proposed section regarding full faith and credit for protection orders, and as we have already outlined our concerns about mandatory restitution, we will focus here upon the two new offenses created by this subtitle.

In our view, these two new offenses represent an enormous increase in federal law enforcement responsibility in a subject-matter area which has traditionally been one of the most decidedly local. Family and domestic relations law, including its criminal aspects, has always been appropriately left to the states, and we in the federal government should be most reluctant to federalize it. Moreover, the offense of traveling to commit spousal abuse has as a predicate a violation of *state* law — either a law specifically related to domestic or family violence or a law on subjects ranging from battery or sexual assault to property damage or theft, so long as the victim is the offender's spouse. All of these underlying state law offenses are ones in which local law enforcement officers would ordinarily be called to the scene and in which local officers have a special expertise. There is little practical sense in providing for federal investigations and prosecution of these offenses simply because there has been some interstate travel in the process, and it is at best a questionable use of limited law enforcement resources. The essence of the proscribed conduct is the act of spousal abuse

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[1] The President's Task Force on Victims of Crime (December 1982) and the Attorney General's Task Force on Family Violence (September 1984) have examined these issues. The eighteen states are Kansas, Idaho, Alaska, Alabama, Rhode Island, North Carolina, New Mexico, Minnesota, Wyoming, Virginia, Texas, New York, Michigan, Louisiana, Hawaii, Nebraska, Indiana, and Arkansas.

itself or the state law offense against the spouse, not the interstate travel.

Finally, we have some of the same concerns about the offense of interstate violation of protective orders, but we also believe such an offense is unnecessary because the bill's provision requiring states to give protective orders of other states full faith and credit appears fully adequate to address the violation of foreign-state protective orders.

Subtitle B This subtitle would create grants to encourage pro-arrest policies in cases of spousal or family violence and would bar state and local participation in the grant program unless there is such a pro-arrest policy. Proof that warrantless misdemeanor arrests are permitted serves as sufficient (though not necessary) evidence of such a policy.

We strongly support the policy of arrest in domestic violence cases, which the Attorney General's Task Force on Family Violence endorsed in September 1984. We agree that there should be a firm and swift law enforcement response to domestic violence with the police and criminal justice system focusing on the abuser and recognizing the criminality of his behavior. The Department's Office for Victims of Crime has pursued this policy by encouraging a pro-arrest policy for law enforcement officers, recommending criminal penalties for violation for protection orders, encouraging prosecutors to prosecute vigorously domestic violence cases, and urging judges to mandate treatment for batterers who would benefit by counseling. We have doubts, however, about the need for additional grants and about restrictions based on pro-arrest policies. Forty states have made progress toward adopting pro-arrest policies and laws. Thirty states authorize police officers to make an arrest for misdemeanor assault in domestic violence cases on the basis of probable cause alone, without having witnesses the assault or having an arrest warrant. Ten others have *mandated* arrest if probable cause exists. The trend is decidedly in the direction of pro-arrest policies; more than half of law enforcement agencies in cities with populations greater than 500,000 have such policies.

* * *

Title III This title would create a federal civil rights damage remedy for crimes of violence motivated by the victim's gender. We strongly endorse the goal of deterring sexual crimes against women and providing victims with meaningful redress. However, we cannot support the creation of a duplicative federal damage remedy, particularly without a showing that current state remedies are inadequate. We also have serious concerns about the open-ended draftsmanship of the section and the doubtful constitutional basis for the bill's cause of action insofar as it covers underlying acts that were not taken under color of state law.

First, rather than treating rape or sexual assault as a *criminal* civil rights violation — which would divest local prosecutors of one of their traditional and substantial responsibilities and would require United States Attorneys to take on the duty of prosecuting these serious but essentially local crimes — the bill instead creates a federal *civil* remedy for sexual assaults. Providing a federal cause of action against the rapist, who will frequently be judgment-proof, is not likely to be an effective deterrent, as you candidly acknowledged in the statement you released at a June 20 hearing you held on this subject.[2]

Second, in those cases in which damages could be recovered, the new federal remedy provides little that is unavailable through existing state remedies. We are unaware of any state that lacks a cause of action for the intentional tort of battery; nor have we heard that many women have encountered problems in recovering punitive damages against the offender under state law.

* * *

Finally, we are concerned that a cause of action based on acts that were not committed under color of state law may be unsupported by the Constitution. We have little doubt that there is constitutional authority to create such a cause of action where the acts *were* under color of law, but we are unable to discern the

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[2] You stated: "I hear commentators on television and the press saying 'Well, will this stop violence against women by making it a civil rights violation?' The answer is no. That is not my intention. My intention . . . is to change the nation's attitude."

authority for reaching purely private action. Unlike other civil rights legislation based on the commerce clause (*e.g.*, Title VII) or the Thirteenth Amendment (*e.g.*, 42 U.S.C. §§ 1981, 1982, and 1985), either which may constitutionally reach certain types of private conduct, this bill appears to be predicated upon the Fourteenth Amendment. But that amendment, by its plain terms and through consistent judicial interpretation, reaches only state action, and we have serious doubts that section 5 of the amendment supports legislation reaching the purely private conduct of a person who rapes or sexually assaults a women, even if *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), is taken at face value. We do not wish to prolong this letter with an extended legal analysis, but if you are determined to proceed with this provision, we urge that further consideration be given to the sorts of modifications that would have to be made to this cause of action to ensure its constitutionality. We would be happy to discuss our legal analysis with you if you so desire.

In conclusion, while we strongly support the goals of protecting women against violent crime and of ensuring that adequate redress is available, we cannot support this bill in its current form.

* * *

/s/ Bruce C. Navarro
Bruce C. Navarro
Deputy Assistant Attorney General

APPENDIX G

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General — Washington, D.C. 20530

April 9, 1991

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is to provide the views of the Department of Justice on S. 15, the Violence Against Women Act of 1991.

* * *

Title II.

Subtitle A. This subtitle creates a new chapter 110A of title 18, United States Code, regarding violence against spouses (or "intimate partners"). This is a somewhat revised version of a similar subtitle of S. 2754 last year, containing as well a new provision to enable federal judges to issue temporary orders of protection for abused spouses.[4]

We are very concerned about the problems of family violence; indeed, following issuance of the report of the Attorney General's Task Force on Family Violence in September 1984, the Department's Office for Victims of Crime has worked to encourage a pro-arrest policy for law enforcement officers, recommended criminal penalties at the state level for violations of protection orders, encouraged prosecutors to prosecute domestic violence

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[4] This new section 2263 of title 18 does not show up in the chapter heading at p. 48, line 11 of the bill.

cases vigorously, and urged judges to mandate treatment for batterers who would benefit by counseling.

Nevertheless, as we explained in our letter last year, family and domestic relations law is fundamentally local in nature, and we question the wisdom of federalizing it. The version in S. 15 would even have federal judges issuing temporary orders of protection to abused spouses.

In contrast, we do consider full faith and credit for protection orders to be a useful means of addressing multi-state family matters at the local level, and we support this provision in concept. We prefer, however, the stronger version contained in section 235 of Senator Dole's bill, S. 472, which is simple, direct, and adequate to achieve the goal of nationwide enforcement of protection orders issued in any state.

We have some drafting suggestions that would improve proposed 18 U.S.C. § 2265, the full faith and credit provision of S. 15. First, in light of the definition in proposed § 2266, orders designed to protect abused "spouses" or "intimate partners" would be covered, but not orders protecting other persons, such as abused or sexually molested children. Section 235 of S. 472 is of broader scope, providing for enforcement of any order "prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person."

Second, proposed § 2265(b) sets out limitations relating to jurisdiction and procedural due process in the issuing court. These provisions are apparently meant to be a codification of certain aspects of the definition of the full faith and credit concept that appears in the caselaw construing the constitutional full faith and credit provision and the full faith and credit statute (28 U.S.C. § 1738). It is unnecessary and potentially counterproductive to repeat these particular conditions in the proposed new statute.

Third, proposed § 2265(c) would deny full faith and credit to protection orders, issued against persons who have themselves sought protection orders, unless such an order was based on a written pleading and the court has made specific findings that each party was entitled to a protection order. We do not follow the logic of having a general rule of *non*-enforcement of protection

orders simply because the issuing court has not granted protection orders to *both* parties. The issuing court may validly conclude that the party who initially petitioned for an order was not entitled to one, but that the other party was.

Subtitle B. This subtitle would create a $25,000,000 grant program to encourage a policy of arrest in spousal abuse cases. As we explained in our letter last year, we are not convinced this program is necessary. The Department has, for a long time, actively promoted pro-arrest policies in these cases, and the states and localities have already made excellent progress in that direction.

Subtitle C. Funds authorized pursuant to this subtitle would support shelters under the Family Violence Prevention and Services Act (FVPSA), administered by the Department of HHS. The authorization level for FY 1992 is $85,000,000 for FY 1993 is $100,000,000, and for FY 1994 is $125,000,000, of which 85% would be devoted to shelters and related assistance. We refer to our letter last year for comments on this subtitle, which is modified from last year only in increasing authorization levels and target percentage.

We are somewhat concerned that the bill's focus on FVPSA funding of shelters ignores the *existing* funding related to shelters from the Department of Justice. The Crime Victims Fund, administered by our Office for Victims of Crime, has a current authorization level of $150,000,000. There has been a rapid increase in federal fine collections and deposits into the Fund, and, as a result, we have steadily increased our support of services for victims of domestic violence since 1986, including support for shelters, counseling, and other assistance for battered women and their children, to the point where our funding has eclipsed the grants available under FVPSA. State crime victims compensation programs, which are augmented with VOCA funds, are also significantly increasing their financial support of victims of domestic violence. An advantage of these programs is that they promote victim cooperation with law enforcement — an essential element of any effort to combat violence in the home.

Subtitle D. This subtitle amends the FVPSA by expanding its mandate to include public awareness activities and making several other substantive changes to this grant program.

Section 243 authorizes grants for public information and ad campaigns on the subject of domestic violence. We have seen remarkable successes of public-private partnerships in ad campaigns on a variety of important social issues — such as employment of adults with disabilities — and the idea of promoting such campaigns is sound. However, federal funding has not been a part of the success of these campaigns, and we doubt that such funding is necesssary to encourage a campaign relating to domestic violence. Indeed, federal funding may prompt the private sector to invest its resources in other areas without federal funding.

Section 244 adds a new requirement that states receiving FVPSA grants must establish Commission on Domestic Violence to examine a variety of law enforcement, prosecution, and victims issues in the area of domestic violence.[5] We are pleased that this provision recognizes the importance of law enforcement and the criminal justice system in combatting domestic violence, but we note that it significantly changes the nature of the FVPSA grant program. That program was originally enacted to support services to previously unrecognized victims — victims of elder abuse, child abuse, and spousal abuse — and has traditionally placed little emphasis on law enforcement involvement. Indeed, since its inception, the bulk of the FVPSA funding has gone to domestic violence shelters, leaving the law enforcement training responsibility to be administered by the Department of Justice. We believe that law enforcement issues should continue to be addressed through our victims assistance and law enforcement assistance

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[5] As we have previously noted, many states have already convened commission of this nature. We wonder whether it is necessary to mandate this if it is already being done. In addition, given the law enforcement and criminal justice orientation of the required commissions, we are not sure why at least one-third of the members of these commission must be associated with shelters. It would be a better idea to encourage states to include victims' representations on the commissions but not to specify to such a degree the specific nature of the victims' group.

programs, which are designed to improve the criminal justice response to family violence and to provide coordinated victim assistance services.

* * *

Title III.

This title, which in a nutshell creates a federal damage remedy for rape, no matter who the offender or what circumstances, is a minimally modified version of title III of S. 2754, on which we provided extensive comments in our letter on that bill last year. Since the concerns we expressed were not taken into account in S. 15, our views remain exactly the same.[7]

* * *

/s/ W. Lee Rawls
W. Lee Rawls
Assistant Attorney General

---

[7] Even the new "limitation" provision of subsection (e)(1), which is titled as if it were intended to narrow the scope of the cause of action, merely reinforces the enormous breadth of that action. It excludes only two types of cases: first, those "random acts of violence" that are "unrelated to gender" — an almost infinitesimal class of cases, given that whenever a woman is a victim of *any* crime a case can be made that the criminal preyed on her thinking she would be an easier target than a man — and, second, those acts that are already excluded under the definition in subsection (d). As we pointed out last year, subsection (d) implies that all rapes and sexual assaults are bias crimes against women, and thus excludes nothing.

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Long Island 1996
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Supreme Court, U.S.
FILED
MAR 3 1999
CLERK

No. 98-1326

In the Supreme Court of the United States

OCTOBER TERM, 1998

RITA GLUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

ALAN E. UNTEREINER
Mayer, Brown & Platt
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5 pp

SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner wishes to draw to this Court's attention a number of relevant developments that have occurred since the filing of the petition for certiorari on February 18, 1999. The filing of this supplemental brief is made necessary by the Solicitor General's strategic decision, on February 26, to waive a response to the petition for certiorari in this case.

1. On February 23, 1999, the United States Court of Appeals for the Sixth Circuit issued its decision in *United States* v. *Page*, 1999 U.S. App. LEXIS 2696 (6th Cir.), upholding a conviction for "interstate domestic violence" under 18 U.S.C. § 2261(a)(2), by the 8-8 vote of an equally divided en banc court. This was one of the two pending en banc cases raising VAWA's constitutionality under the Commerce Clause that were discussed in the petition for certiorari (at 5, 9, 20-21), and the only pending en banc case that involved a criminal provision of VAWA. *Brzonkala* v. *Virginia Polytechnic Inst.*, 132 F.3d 949, 977 (4th Cir. 1997), vacated and reh'g en banc granted (Feb. 5, 1998), which has been pending before the Fourth Circuit en banc for more than a year, involves VAWA's private right of action for damages (42 U.S.C. § 13981). See Pet. 19-24 (explaining why this case presents a better vehicle than *Brzonkala* for deciding the Commerce Clause issue and for addressing the continuing federalization of traditional state law crimes).

As predicted (Pet. 20-21), the Sixth Circuit's fractured en banc decision in *Page* largely turns on a disagreement over statutory construction. Page's conviction rested on 18 U.S.C. § 2261(a)(2), which makes it a crime to "cause[] a spouse or intimate partner to cross a state line * * * by force, coercion, duress, or fraud and, in the course of or as a result of that conduct, intentionally commit[] a crime of violence and thereby cause[] bodily injury." Pet. App. 30a-31a. Eight judges took the view that this language covers a situation where the defendant engages in violence *before* the crossing of a state line, where such violence is integrally related to the forcible transportation of the victim or where the victim's existing injuries are aggravated during such transportation. *Page*, 1999 U.S. App. LEXIS 2696, at *8-32 (opinion of Moore, J.). Eight other judges adopted a narrower construction of the statute under which pre-crossing violence is

rarely, if ever, covered. See *id.* at *39-50 (opinions of Kennedy, Ryan, and Wellford, JJ.).[1]

Page is important for several reasons. First, it confirms that this case is the best vehicle by which to examine the constitutional validity of Section 2261 of VAWA. Unlike *Page*, this case would not require the Court to address any issue of statutory construction that might conceivably moot the constitutional question. Second, now that the Sixth Circuit has issued its en banc decision, there is no longer any plausible argument that review should be denied here because this Court should wait for *Page*. Third, the decision in *Page* strongly confirms the need for this Court's intervention if *Lopez* is not to be rendered a dead letter. In *Page*, only Judge Wellford acknowledged the "overarching change in Commerce Clause analysis wrought by *Lopez*." *Page*, 1999 U.S. App. LEXIS 2696, at *53 (Wellford, J., dissenting). All of the remaining members of the en banc court rejected the Commerce Clause challenge based on only the most cursory reasoning. See, *e.g.*, *id.* at *35 (opinion of Moore, J.) (suggesting that court "would have to hold that *Lopez* overruled" *Caminetti* and other cases in order to invalidate Section 2261(a)(2)).[2]

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[1] The Solicitor General's February 18, 1999 waiver in this case stands in sharp contrast to his previous authorization, in *Page*, of the filing of a request for en banc rehearing on the ground that even what he admitted was an "issue of first impression" in the federal courts concerning the proper interpretation of 18 U.S.C. § 2261(a) was so "exceptionally important" that it merited the attention of all sixteen judges of the Sixth Circuit. See U.S. Pet. for Reh'g With Suggestion for Reh'g En Banc, *United States* v. *Page*, at 1 (Mar. 30, 1998); *id.* at iv (certification of U.S. Attorney on behalf of government that, "based on a reasoned and studied professional judgment," the novel statutory construction question of first impression was "of exceptional importance").

[2] A majority of the en banc court in *Page* also rejected the argument that *Caminetti* is distinguishable because the actus reus of the Mann Act is the interstate transportation itself whereas that is not true of the crime of causing interstate transportation under 18 U.S.C. § 2261(a)(2). See 1999 U.S. App. LEXIS 2696, at *36 (opinion of Moore, J.) ("Congress undoubtedly has the power to criminalize the forcible transportation of a person across state lines."); *id.* at *39 (opinion of Kennedy, J.). As

2. On February 22, 1999, the Ninth Circuit denied rehearing and rehearing en banc in *United States* v. *Mussari*, 1999 U.S. App. LEXIS 2643, a case involving a conviction under the Child Support Recovery Act of 1992 ("CSRA"), 18 U.S.C. § 228. Judge Kozinski, joined in part by Judges T.G. Nelson, Silverman, and Graber, authored a lengthy dissent from the denial of rehearing en banc in which he objected to the panel's decision (see 152 F.3d 1156) to reverse Mussari's conviction on ex post facto grounds not raised below and sharply criticized the panel majority for suggesting that "federal enforcement efforts under the CSRA have run amok." 1999 U.S. App. LEXIS 2643, at *12-13. See 152 F.3d at 1159 ("[I]n choosing among the thousands of persons delinquent in honoring their child support obligations, the government need not show itself an unfeeling monster, or make the law hideous, by selecting as its target an ineffectual worker, plagued by accidents and bad luck, without assets to make any restitution, without children to whom he has any legal connection, and with a present wife and family to whom he has important ties.").

According to Judge Kozinski's dissent, the panel majority's "broad hint that the government ought not to bother us with cases such as this in the future is only the latest wrinkling of the federal judicial nose." 1999 U.S. App. LEXIS 2643, at *15-17 (citing letter from the Hon. J. Clifford Wallace to Chief Justice William H. Rehnquist and quoting the following statement of District Judge Paul G. Rosenblatt during Mussari's trial: "I will go to my grave believing that [the CSRA] is unconstitutional . . . . I thought I'd gotten out of the child support business when I left the state courts. Those were impossible cases to resolve then * * * [and] are equally * * * impossible today."). Judge Kozinski's opinion is reflective of the new pressures and strains that have been placed on the federal judiciary by Congress's recent efforts to create unprecedented federal crimes in the area of domestic relations, an area long regulated exclusively by the States. See Pet. 12-15. It

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previously explained (Pet. 25-26, 30), however, that distinction *does* hold true for Section 2261(a)(1), which does not directly target interstate transportation itself but rather merely adds the element of interstate travel to the traditional state crime of domestic violence in order to federalize it.

also illustrates the pressing need for additional guidance by the Court in this important area of the law.

3. Since the filing of the petition for certiorari, the Administration has announced a series of major new grants to the States and to the District of Columbia to assist state and local governments in *their* efforts to combat domestic violence. See, *e.g.*, *Gore Announces Grants To Help California Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($24,226,782 in grants to prosecutors and other law enforcement officials and to support victim services); *Gore Announces Grants To Help Florida Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($10,110,641 in grants); *Gore Announces Grants To Help Illinois Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($8,211,605 in grants); *Gore Announces Grants To Help New York Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($14,203,593 in grants); *Gore Announces Grants To Help Texas Combat Domestic Violence*, U.S. NEWSWIRE, Feb. 26, 1999 ($13,397,940 in grants).

The total amount of these new grants by the federal government (which are earmarked for "56 states and territories") is almost a quarter of a billion dollars. Sonya Ross, *Feds Target Violence Against Women*, AP ONLINE, Feb. 26, 1999 ($223 million in grants). These recent actions by the federal government strongly confirm a key submission in our petition (at 30): even if the Commerce Clause does not authorize Congress to federalize the traditional state crime of domestic violence, Congress retains ample power under the Spending Clause to combat domestic violence by assisting the *States* in *their efforts* in this regard.[3]

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[3] Since the filing of the petition, VAWA's criminal provisions and the government's prosecution in this case have come under additional criticism. See Stuart Taylor, Jr., *Irrational Excesses, Barbaric Penalties and Political Opportunism*, THE NATIONAL JOURNAL, Feb. 27, 1999, at 521 (describing petitioner's conviction as involving a "classic state-law murder" case and noting that if the jury had found that petitioner drove to Pearl River, New York not from "a few miles" over the New Jersey border but instead "from Buffalo — a few hundred miles away — there would have been no federal jurisdiction"); *ibid.* ("So wife-beating is now a federal crime, depending on whence the wife-beater arrives at the

4. Since the petition for certiorari was filed, the Administration has suggested that new efforts at the federal level — including possibly new federal criminal proscriptions — might be warranted to address the problem of domestic violence. See Sonya Ross, *Feds Target Violence Against Women*, AP ONLINE, Feb. 26, 1999 (reporting that Vice President Gore has asked Attorney General Reno to review and suggest strategies for combating domestic violence and stalking through the use of the Internet). VAWA's incursion on state prerogatives in the area of domestic relations may thus prove to be only a first step in this new direction.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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scene. As it turns out, husband-killing too."); *ibid.* (arguing that "Congress and the President should ask themselves exactly what purpose it serves to take cases like this, not to mention the more routine domestic spats that sometimes sprawl across state lines, away from the states").

[4] Although dated 1998, the American Bar Association's Task Force Report cited in the petition (at 21-22), see AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998), was in fact publicly released on February 16, 1999, only two days before the petition for certiorari was filed in this case. For the Court's convenience, we have lodged 10 copies of the Task Force's Report with the Clerk. The Task Force was chaired by Edwin Meese III and consisted of a diverse group of luminaries, including Sara Sun Beale, Howell Hefflin, Philip Heymann, Robert Kastenmeier, Robert S. Litt, Barbara Meierhoefer, Jon O. Newman, Otto G. Obermaier, William W. Taylor III, and John K. Van de Kamp.

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No. 98-1326

In the Supreme Court of the United States

OCTOBER TERM, 1998

RITA GLUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

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SECOND SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner wishes to call this Court's attention to a significant development that has occurred since the filing of Petitioner's Supplemental Brief on March 3, 1999. On March 5, the United States Court of Appeals for the Fourth Circuit issued its long-awaited, en banc decision in *Brzonkala* v. *Virginia Polytechnic Institute*, holding by a 7-4 vote that the Violence Against Women Act ("VAWA") exceeds Congress's authority under the Commerce Clause. The Fourth Circuit's reasoning conflicts in several respects with the Second Circuit's analysis in this case and the court's invalidation of VAWA should remove any doubt about whether this case merits review.[1]

1. *The Fourth Circuit's En Banc Decision.* Judge Luttig's 124-page opinion for the majority was joined by Chief Judge Wilkinson and by Judges Widener, Wilkins, Niemeyer, Hamilton and Williams. See slip op. 5-129.[2] Chief Judge Wilkinson (*id.* at 132-46) and Judge Niemeyer (*id.* at 147-60) also wrote separate concurrences. Judge Motz, joined by Judges Murnahan, Ervin and Michael, dissented. *Id.* at 162-214.

Based on an exhaustive analysis of the Commerce Clause issue (slip op. 13-74), Judge Luttig's opinion for the court concludes that VAWA "simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded." Slip op. 6. This Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), Judge Luttig explained, "all but preordained as much"; he criticized the government's arguments as "little more than wistful assertions that * * * *Lopez* is an aberration of no significance." Slip op. 6. VAWA's damages remedy for gender-motivated violence (42 U.S.C. § 13981) exceeds Congress's power under the Commerce Clause, the majority reasoned, because (1) the violent conduct targeted by the statute is in no sense economic or commercial (slip op. 20-24); (2) the damages remedy lacks an

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[1] In an effort to avoid burdening this Court with another Supplemental Brief, counsel requested the government to withdraw its waiver of a response, but the government declined to do so.

[2] For the Court's convenience, we have lodged eleven copies of the Fourth Circuit's slip opinion with the Clerk.

express jurisdictional element (*id.* at 24-25); and (3) to uphold the statute would require resort to "arguments that lack any principled limitations and would, if accepted, convert the power to regulate interstate commerce into a general police power" (*id.* at 28). *Lopez*, the majority explained, "clearly forecloses" reliance on arguments based on attenuated effects on the national economy, at least where the regulated conduct consists of "*noneconomic* activities." Slip op. 31 (emphasis in original).

The majority also emphasized that VAWA impinges on state authority over violent crime and domestic relations. Slip op. 32-34, 36-37.[3] And it rejected the argument that Section 13981 of VAWA should be upheld under the Commerce Clause because (1) Congress made "findings" establishing a connection between gender-motivated violence and interstate commerce which are entitled to deference; and (2) this particular provision concerns "civil rights," an area "of manifest federal concern." Slip op. 40; see also *id.* at 41-74. The majority also rejected the argument that Section 13981 could be upheld under Section 5 of the Fourteenth Amendment. *Id.* at 75-128.

2. *The Fourth Circuit's Analysis Conflicts With The Decision Below.* The Second Circuit in this case summarily rejected petitioner's Commerce Clause challenge by expressly "adopt[ing]" the district court's analysis. Pet. App. 2a. The district court, in turn, reasoned that (1) "[t]he challenged statutory provision [of VAWA] arose in an area in which Congressional power is *exceedingly broad*" (*id.* at 9a (emphasis added)); (2) a reviewing court must apply "rational basis" review to Congress's determination that a statute falls within its Commerce Clause authority (*id.*

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[3] Slip op. 33-34 ("[I]t is clear that the balance between federal and state responsibility is implicated not only by federal criminal statutes, but also by any federal sanction for such crime, even in the form of a civil remedy."); *id.* at 36 (stating that "primary locus" of Section 13981 "is domestic violence, a type of violence that, perhaps more than any other, has traditionally been regulated not by Congress, but by the several States"); *id.* at 37 (referring to "this most traditional area of state concern"); see also *id.* at 143 (Wilkinson, C.J., concurring) (stating that VAWA "scales the last redoubt of state government — the regulation of domestic relations").

at 9a-10a); (3) the fact that Congress "alluded" to "the substantial toll of domestic violence on the physical and economic welfare of individuals directly affected by such violence as well as the public generally" sufficed to establish the requisite rational basis for the statute (*ibid.*); and (4) this Court's *Lopez* decision "concerned only * * * the third category of activity" that Congress can regulate under the Commerce Clause — wholly intrastate activity that has a substantial effect on interstate commerce (*id.* at 10a).

The Fourth Circuit's reasoning is in conflict (or at least considerable tension) on each of these points. Far from recognizing an "exceedingly broad" congressional authority over the problem of violence against women, the Fourth Circuit reasoned that Congress's Commerce Clause authority in this area is limited because the activity targeted by VAWA is noncommercial in nature and trenches on traditional state authority in several respects. See page 2, *supra*. Second, the Fourth Circuit rejected the notion that *Lopez* requires a highly deferential rational-basis review and instead conducted an independent evaluation of Congress's "findings" relating to gender-motivated violence. Slip op. 41-51, 53. Third, the mere allusion to an impact on the national economy of domestic violence is woefully insufficient, under the Fourth Circuit's analysis, to establish that VAWA is constitutional. And fourth, the Fourth Circuit refused to read *Lopez* in a cramped or restrictive fashion.

The Fourth Circuit's analysis is also sharply at odds with the decision below in the significance it attaches to *Lopez*'s discussion of whether the conduct targeted by a congressional enactment is commercial in nature. The district court in this case begrudgingly stated that the "noncommercial" nature of the activity targeted by VAWA "*might* carry *some* weight" in a Category III case, but concluded that it was essentially irrelevant in a Category I case where interstate activity is involved. Pet. App. 12a-13a (emphasis added). In marked contrast, the Fourth Circuit read *Lopez* as placing "*enormous* emphasis * * * on the 'commercial concerns that are central to the Commerce Clause[]' * * * and on the corresponding distinction between regulations of commercial or economic activities and regulations of noncommercial, noneconomic activities." Slip op. 17 (emphasis added) (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)); *id.* at 17-19

n.5 (stating that it is "impossible to ignore" this distinction and faulting the dissent and the government for doing so).

3. *The Fourth Circuit's Decision Confirms That This Case Provides The Best Vehicle To Clarify* Lopez *And Congress's Authority Over Domestic Relations*. As we explained in the petition for certiorari (at 15-19), there has been considerable confusion in the lower courts over the meaning of *Lopez*. This confusion includes uncertainty over the precise contours of Categories I, II and III of Congress's Commerce Clause authority. Pet. 17-18. By urging broad interpretations of the "channels" (Category I) and "instrumentalities" (Category II) of interstate commerce, the government ironically has succeeded, since *Lopez*, in *expanding* Congress's Commerce Clause power. Pet. 17-18.

This troubling phenomenon cannot be rectified, we submit, if this Court grants review only of a case (such as *Brzonkala*) involving Section 13891. The reason is simple. As the Fourth Circuit's opinion makes clear (slip op. 15 n.4), Section 13891 can be upheld only as a Category III statute. Indeed, the government did not even argue in *Brzonkala* that Category I or II applied. In contrast, the government in *this* case contended in the lower courts that Section 2261(a)(1) of VAWA can be upheld under *all three categories*. See Pet. 17; C.A. Br. 44-56. If review is granted in this case, the government will no doubt reiterate these arguments. Accordingly, this case offers a valuable opportunity to clarify the boundaries of Categories I, II and III that *Brzonkala* plainly does not offer.

Moreover, granting review in *Brzonkala* alone would threaten to exacerbate some of the problems identified in the petition for certiorari. If the Fourth Circuit's decision were affirmed (as we expect it would be), this would only drive the government to even greater lengths in its efforts to shoehorn statutes into Categories I and II and to argue that *Lopez* has no relevance to those categories. In view of the potential overlap between Category I and III (see Pet. 17-18), this is a recipe for further confusion and arbitrariness.

As predicted in our petition for certiorari (at 20), *Brzonkala* also required the Fourth Circuit to address, at length, an alternative basis for congressional authority: Section 5 of the Fourteenth Amendment. See slip op. 75-128. And *Brzonkala*, like *United*

States v. *Page*, 1999 U.S. App. LEXIS 2696 (6th Cir. Feb. 23, 1999), involves a threshold question of statutory interpretation that, if answered differently, would obviate the need to reach any constitutional question. Slip op. 12-13 & n.3; Supp. Br. 1-2; Pet. 20-21. Because the provision of VAWA at issue in this case cannot be defended as an exercise of Section 5 authority, and because our petition for certiorari raises no threshold question of statutory construction, this case more cleanly and surely presents the Commerce Clause issue than does either *Brzonkala* or *Page*.

The *Brzonkala* decision also confirms the superiority of this case as a vehicle for addressing the important issue of Congress's authority over matters of domestic relations, which have long been regulated by the States. See Pet. 11-15, 20; Supp. Br. 3-4. As Judge Luttig correctly notes, Section 13981 "explicitly precludes the federal courts from exercising supplemental jurisdiction that might otherwise extend to" family-law matters. Slip op. 36 (citing 18 U.S.C. § 13981(c)(4)); accord Pet. 20. Section 2261(a), in contrast, contains no such limitation. In addition, Section 2261(a) covers only violence in marriages and other intimate relationships; Section 13981, in contrast, covers violence "motivated by gender" even when it occurs outside of family or other intimate relationships. This case is accordingly a far better vehicle for addressing Congress's authority in the sensitive area of domestic relations.

4. Brzonkala *Does Not Present Any Issue Concerning The Federalization of State Crimes*. Although the Fourth Circuit did note that Section 13981 provides a federal "remedy for violent crime in addition to that provided by the States" (slip op. 33), and observed that such supplementation "inescapably lead[s] to changes in the allocation of state law enforcement and judicial resources" (*ibid.*), the court had no occasion to address directly the serious problem of the ongoing federalization of traditional state law. See Pet. 21-24; Supp. Br. 4 & n.4. This case, in contrast, squarely raises that important issue.

* * *

The United States intervened as a party in *Brzonkala*. It is simply inconceivable, we submit, that the Solicitor General would not file a petition for certiorari in *Brzonkala* if review is denied in this case. Why then does the government not even bother to file

a response to the petition in this case? While we can understand the government's desire to avoid making contradictory statements in opposing review in this case while simultaneously petitioning for review in *Brzonkala*, that parochial litigation interest hardly justifies withholding the government's views from this Court.

The Court should, at a minimum, call for a response from the Solicitor General. Petitioner is serving a life sentence under a statute that has now been declared unconstitutional. She is entitled to know why the government disagrees with the substantial arguments for review that have been put forward in the petition. The various *amici* who have indicated that they believe this case is so important that they will be filing briefs in support of the petition are likewise entitled to a response from the United States. And, most importantly, so is this Court.

CONCLUSION

The petition for a writ of certiorari should be granted or, at a minimum, the Court should call for the views of the Solicitor General.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

RITA GLUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* TEXAS JUSTICE FOUNDATION IN SUPPORT OF THE PETITION

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1827

QUESTION PRESENTED

Whether, in light of this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), Congress' power "to regulate Commerce * * * among the several states" (U.S. Const. art. I, § 8, cl. 3), includes the authority to create the national domestic-relations crime of "interstate domestic violence" contained in the Violence Against Women Act of 1994, 18 U.S.C. § 2261(a)(1).

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Jay S. Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*,
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INTEREST OF THE *AMICUS CURIAE*[1]

The Texas Justice Foundation is a nonprofit corporation that provides free legal representation in cases involving the protection of individual rights and cases that seek to limit government to its proper role. *Amicus* is deeply concerned about federal government interference in matters of local crime control. It believes that, under the Constitution and the principles of federalism that it embodies, the prosecution and punishment of ordinary criminal offenders are matters of state and local government responsibility. This Court's holding in *United States v. Lopez*, 514 U.S. 549 (1995), provides an important safeguard against invalid federal interference with state and local efforts to control crime. In addition, the Domestic Violence Clause of Article IV of the Constitution reinforces the need to give vigilant scrutiny to any attempt to federalize violent crime.

This case involves the Violent Crime Control And Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, Title IV of which is known as the Violence Against Women Act (VAWA). A provision of VAWA creates the new federal crime of "interstate domestic violence." 18 U.S.C. § 2261 (a)(1). The statute turns murder, among other forms of violent conduct, into a federal crime where (i) the victim is the murderer's spouse or "intimate partner" and (ii) a state line is crossed. The statute does not explicitly require any connection between the crime and commerce, and there is no basis on which to conclude

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[1] Counsel for both parties have consented to the filing of this brief, and *Amicus* has filed their consents with the Clerk of this Court. Counsel for a party did not author this brief in whole or in part. No person or entity other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

that this sort of crime substantially affects interstate commerce. In view of the implications of the Domestic Violence Clause and the uncertainty surrounding application of *Lopez*, *Amicus* believes that this case provides the Court with an excellent vehicle for reviewing the constitutionality of this new crime.

Article IV's Domestic Violence Clause Implicitly Acknowledges Constitutional Limits on Legislative Attempts to Federalize Control of Violent Crime

Article IV, § 4 of the Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4. *Amicus* urges this Court to consider the impact of the proviso that "The United States shall . . . protect each of them . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence" ("Domestic Violence Clause") on Congress' power to enact federal criminal legislation. Though the Court has held that the Government's obligations under The Domestic Violence Clause are not justiciable, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 42-43 (1848), it has not thoroughly considered the impact of the Domestic Violence Clause on the limits of federal power. This case presents the Court with an opportunity to address the meaning of the Domestic Violence Clause and its implications for the limits on federal power.

Recent scholarship offers important insights into how the Domestic Violence Clause imposes, or at least acknowledges, substantive limits to Congress' enumerated powers. In his article *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 4 (1997), Professor Jay S. Bybee outlines the role the Domestic Violence Clause plays as a "Tenth Amendment for crime." According to Professor Bybee, the Domestic Violence Clause was motivated primarily by lingering concerns over Shays' Rebellion. *Id.* 19-21. It provides an "independent justification for demanding that Congress demonstrate that it has not displaced the criminal authority of the states when it legislates against crime in the states." *Id.* at 81.

The impact of the Domestic Violence Clause on the limits of the commerce power is especially important with respect to the constitutionality of VAWA. In a very recent *en banc* decision, the Fourth Circuit held that VAWA exceeded Congress' authority under the Commerce Clause in providing a cause of action against any "person . . . who commits a crime of violence motivated by gender." *Brzonkala v. Virginia Polytechnic Institute*, No. 96-1814 (*en banc*), slip op. at 8 (4th Cir. 1999) (reviewing 42 U.S.C. § 13981(c)). Writing for the majority, Judge Luttig discussed insightfully the distinction between violence and commerce: "[V]iolent crime motivated by gender animus . . . [n]ot only is . . . not commercial, it is not even economic in any meaningful sense." *Id.*, slip op. at 20. In fact, limiting the reach of VAWA to crimes motivated by gender "excludes from its purview those violent crimes most likely to have an economic aspect — crimes arising solely from economic motives — and instead addresses violent crime . . . relatively unlikely to have any economic character at all." *Id.*, slip op. at 21. The Fourth Circuit expressed additional suspicion of VAWA because "domestic violence [is] a type of violence that, perhaps more than any other, has traditionally been regulated not by

Congress, but by the several States." *Id.*, slip op. at 36. The Domestic Violence Clause, because it acknowledges that control of violent crime is reserved to the states, reinforces the Fourth Circuit's suspicion.

The law at stake here proscribes activity — violence against one's spouse or "intimate partner" — with as complete a disjunction with commerce as that at stake in *Brzonkala*. *See* 18 U.S.C. § 2662(a)(1). Yet, unlike the Fourth Circuit in *Brzonkala*, the lower courts here did not review Congress' commerce power justifications for enacting VAWA with anywhere near the level of skepticism that the Court established as the standard in *United States v. Lopez*, 514 U.S. 549 (1995). *See* Pet. App. 9a-10a. The Domestic Violence Clause reinforces the *Lopez* decision's skepticism, and the Court should grant certiorari in this case to consider the limitations the Domestic Violence Clause acknowledges on federal power to control violent crime.

A. The Domestic Violence Clause Applies To Violent Crime

The Domestic Violence Clause provides constitutional authority for federal government protection against domestic violence, a subset of which is proscribed by the federal crime of "interstate domestic violence." *Amicus* does not suggest that when the Framers included the Domestic Violence Clause in the Constitution they necessarily had in mind the exact sense in which the term "domestic violence" is used in VAWA. VAWA uses the term "domestic violence" in the sense of spousal or "intimate partner" abuse. 18 U.S.C. § 2261(a)(1). "Domestic" under this statute largely, though not exclusively, refers to a household. *See* 18 U.S.C. § 2266 (defining "spouse or intimate partner" as one "who shares a child in common with the abuser" or "cohabits or has cohabited with the abuser as a spouse"). Under the Domestic

Violence Clause, "domestic" no doubt refers to a sphere of violence larger than, but including, household violence.

Because the Domestic Violence Clause addresses a larger range of violence than VAWA, it plainly covers overlapping instances of violent conduct, such as murder and other violent crimes against people and property. *See* 18 U.S.C. § 16 (defining "crime of violence" in part as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"). When adopting the Domestic Violence Clause, in fact, the Framers refused a last-minute amendment to substitute the term "insurrections" for "domestic violence," a change that would have limited it to violence directed against the state itself. Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 34. The Framers' rejection of "insurrections" in favor of "domestic violence" implies that they intended the clause to apply to all violent crime. *See id.* at 39-40.

Some Federalists may have understood the Domestic Violence Clause to cover only insurrection violence, or "crime against government qua government." *Id.* at 39. However, early commentators such as St. George Tucker, William Rawle, Joseph Story, and Thomas Cooley understood "domestic violence" to refer to crimes other than insurrection. *Id.* As Professor Bybee reports, Tucker emphasized the broad nature of the Domestic Violence Clause's reservation of authority:

> [E]very pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence is taken away, by that part of the provision which renders an application from the legislative, or executive authority of the state endangered, necessary to be made to the federal

> government, before it's [sic] interference can be at all proper.

1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, app. at 367, *as quoted in* Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 39. In Tucker's view, then, the Domestic Violence Clause affected all domestic *concerns*, including violent crime. *See id.* at 39-40.

Later interpretations of the Domestic Violence Clause also understood it to refer generally to violent crime. In 1857, United States Attorney General Caleb Cushing advised that "the constitutional obligation of the United States to protect each of the States against 'domestic violence'" meant that no citizen had a right to incite "domestic violence, that is robbery, burglary, arson, rape, and murder." *Yazoo City Post Office Case*, 8 Op. Atty. Gen. 489, 493-494 (1857).

Thus, the Domestic Violence Clause refers to more than just violence directed against the state. The clause does not, in contrast with the Militia Clause of article I, § 8, refer to "insurrections," a term the Framers explicitly rejected for purposes of the Domestic Violence Clause. Instead, the Framers provided for states to request federal protection even when they could not protect citizens against violent crimes directed at their citizens and their citizens' property, crimes such as murder, rape, robbery, and arson. The Domestic Violence Clause, therefore, provides the means for federal protection against the same sort of violence that the federal crime of "interstate domestic violence" proscribes.

B. The Domestic Violence Clause Presumes That The Federal Government's Enumerated Powers, Including the Commerce Clause, Provide Insufficient Justification for Congress to Control Violent Crime

Because the Domestic Violence Clause provides the means for states to apply for federal protection against violent crime, it reflects a presumptive commitment of the power to control violent crime to the states. The clause reflects the Framers' view that, in the absence of a state application for protection, Congress would have only intermittent power to control domestic violence.[2] In this vein, Alexander Hamilton warned that, without explicit constitutional guarantees of state governments, "[a] successful faction may erect a tyranny on the ruins of order and law, while no succor could *constitutionally* be afforded by the Union to the friends and supporters of the government." *The Federalist No.* 21 at 126 (Hamilton) (Modern College Library Edition) (emphasis added).

The Domestic Violence Clause, along with the Guarantee Clause and the Militia Clause, provides the constitutional basis for federal succor in circumstances not covered by the enumerated powers. In some sense it may function as a "catch all" federal power to combat violent crime, but only when a state has applied for federal

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[2] This stands in contrast to Congress' power to protect states against insurrection or foreign invasion, neither of which are conditioned upon state application. *See* U.S. Const. art. I., § 8 (providing Congress' power to call up the militia to "suppress insurrections and repel invasions"); U.S. Const. art. IV, § 4 (compelling Congress to protect states against invasion). Of course, Congress' power under Art. I, § 8 to provide for a militia to enforce the laws of the United States provides no substantive guidance as to what laws Congress has the power to enact and enforce.

protection. As Professor Bybee has stated, "This view of the Domestic Violence Clause confirms the enumerated power doctrine. . . . Although a state might believe itself overwhelmed by . . . ordinary crime, the decision whether assistance is needed, like decisions about defining and punishing crime itself, belongs to the state." Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 79.

Under this theory, the Domestic Violence Clause is meaningful only if Congress ordinarily lacks the power to intercede into matters of domestic violence on its own initiative. But under the all-encompassing theory of the Commerce Clause that prevailed below (where the district court referred to the Commerce Clause power as "exceedingly broad," Pet. App. 9a), the Commerce Clause swallows any real meaning the Domestic Violence Clause may have. Because that theory allows for congressional regulation of violent crime that is wholly unrelated to commerce, it permits Congress to intercede in matters of violent crime on the thinnest of pretexts.

The Court should take this case to review the propriety of this "exceedingly broad" theory of the Commerce Clause. Before affirming congressional authority to control violent crime based on assertions of Commerce Clause power, the Court should demand from the Government a theory of the Commerce Clause that would not render meaningless the Domestic Violence Clause's recognition that the power to control violent crime is commited to the states. In effect, the Court should presume that Congress' enumerated powers, including the Commerce Clause, do not generally support federal power to control violent crime. Professor Bybee urges the same:

> [T]he Domestic Violence Clause provides a presumption against federal preemption, co-

> option, and even duplication of state efforts to control domestic violence.

Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 81. Such a presumption is proper because the Domestic Violence Clause provides the textual basis for the understanding that, generally speaking, Congress acts beyond its enumerated powers when it purports to regulate domestic violence (without a proper request for assistance from any state).

The Court's enduring search for substantive textual guidance concerning the limits of federal power highlights the importance of concluding that such a presumption exists in the Domestic Violence Clause. In *New York v. United States*, the Court noted that, while "no one disputes the proposition that '[t]he Constitution created a Federal Government of limited powers,' . . . the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult . . . cases." 505 U.S. 144, 155 (1992) (citation omitted). The Tenth Amendment at a minimum holds the constitutional place for drawing this line, of course, but it is not reliably recognized as a source for substantive demarcation between state and federal authority. *See id.* at 156-57. In the Domestic Violence Clause, the Court should find a textual basis for defining at least in part the proper substantive limits of Congress' ability to regulate under the Commerce Clause (and other grants of power). *See* Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 4 ("The Domestic Violence Clause plays the role of a Tenth Amendment for crime.").

Furthermore, Article IV's substantive demarcation of the limits of federal power supports application of the *Lopez* decision to this case. The Court in *Lopez* properly recognized that the commerce power is inherently limited. It noted that "[u]nder our federal system, the 'States possess primary

authority for defining and enforcing the criminal law' . . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *Lopez*, 514 U.S. at 561, n.3 (citations omitted). *See also Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring) ("Indeed, on this crucial point, the majority and Justice Breyer agree in principle: The Federal Government has nothing approaching a police power."). Based on this "sensitive relation" in which states retain the primary authority for controlling crime, the Court held that a particular class of conduct is not subject to federal control under the commerce power unless the repetition of that conduct exerts a substantial affect on commerce. *Lopez*, 514 U.S. at 559, 567. The Domestic Violence Clause provides an independent textual basis for this holding where Congress exerts power over violent crime, and should leave no doubt that congressional enactments such as that at stake here are presumptively beyond Congress' power. *See* Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 81.

Amicus does not urge that the Domestic Violence Clause necessarily carves out of congressional power all ability to regulate domestic violence absent state application for protection.[3] This Court's decision in *Garcia v. San*

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[3] Further, *Amicus* also does not urge the Court to recognize in this case a cause of action based on any substantive rights protected by the Domestic Violence Clause. Accordingly, cases holding that Article IV generally does not provide justiciable substantive rights do not impact *Amicus*' theory that the Domestic Violence Clause implicitly recognizes substantive limitations on congressional power. *See, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1 (1848) (holding that presidential discretion in exercising powers granted by the Constitution is not subject to judicial review); *Chiles v. United States*, 874 F. Supp. 1334, 1342-44 (S.D. Fla. 1994), *aff'd*, 69 F.3d 1094 (11th Cir. 1995) (holding nonjusticiable the

(continued...)

Antonio Metro. Transit Authority certainly allowed that Article IV does provide some carve-outs of state sovereignty "that Congress may not employ its delegated powers to displace." 469 U.S. 528, 550 (1985). But, though it reflects the Framers' understanding that the enumerated powers are not so extensive as to cover all circumstances where federal protection might be expedient or desirable, the Domestic Violence Clause may be theoretically consistent with Congressional power to control violent crime to the extent of Congress' enumerated powers. Further, according to Professor Bybee, although construing the Domestic Violence Clause as an excision of federal power "is a plausible reading . . . in light of the practices of the earliest Congresses and the Supreme Court's reading of the Necessary and Proper Clause, it is too late in the day to maintain it." Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 80-81. *But see*, *Lopez*, 514 U.S. at 597, n. 6 (Thomas, J., concurring) ("Notwithstanding any substantial effects that murder, kidnaping, or gun possession might have had on interstate commerce, Congress understood [at the inception of the Union] that it could not establish nationwide prohibitions.").

Amicus instead urges the more limited proposition that the Domestic Violence Clause presumes that control of violent crime is a power reserved to the states, and that Courts should view with great suspicion any congressional attempts to federalize that power. Of course, the Federal Government may overcome such a presumption in specific instances. But, "if the United States undertakes to address domestic violence on the basis of its own independent authority, it must demonstrate clear constitutional support for

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[3](...continued)
issue whether the Federal Government had violated the Domestic Violence Clause in allegedly failing to control the influx of illegal aliens into Florida).

its actions." Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 81. For example, the Federal Government may, under *Lopez*, demonstrate clear constitutional support for proscribing violent crime where that crime produces, through repetition, a substantial affect on interstate commerce. *Lopez*, 514 U.S. at 559, 567. It may also regulate a crime involving "an instrumentality of interstate commerce or a thing in interstate commerce," or it may enact a crime that "contains [a] jurisdictional element which would ensure, through case-by-case inquiry, that the [proscribed conduct] in question affects interstate commerce."[4] *Id.* at 559, 561. Congress may also overcome this presumption through the proper exercise of its other powers as well, such as its powers under Section 5 of the Fourteenth Amendment. *See* Bybee, *Insuring Domestic Tranquility*, 66 GEO. WASH. L. REV. at 80 (noting "[t]his interpretation of the Domestic Violence Clause does not disparage the effect of the Fourteenth Amendment.").

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[4] The crime of "interstate domestic violence," of course, requires in part that the government must prove that the defendant crossed a state line with the intent to engage in domestic violence. 18 U.S.C. § 2261(a)(1). If this Court's decisions in *Caminetti v. United States*, 242 U.S. 470 (1917) and similar cases are read to mean that a criminal defendant's mere crossing of a state line (without a further connection to commerce) is sufficient to support exercise of the Commerce Clause power, the Court should consider whether that line of authority is doctrinally consistent with the decision in *Lopez* that a class of activity must "substantially affect" commerce before Congress may proscribe it under the Commerce Clause. *Lopez*, 514 U.S. at 559. However, as petitioner has suggested, the Court may distinguish the *Caminetti* line of authority from the crime of interstate domestic violence on the theory that *Caminetti* referred to Congress' ability under the Commerce Clause to regulate "[t]he *transportation* of *passengers* in interstate commerce," not merely to regulate the crossing of a state line. *See* Petition for a Writ of Certiorari, p. 26 (quoting *Caminetti*, 242 U.S. at 491).

But no matter the source of federal authority, congressional controls of violent crime should, even where they purport to include a jurisdictional element, be subjected to vigilant scrutiny. *See id.* at 82 (noting that criminal statutes against violent crime enacted under the Fourteenth Amendment should be treated the same as statutes enacted under the Commerce Clause). Given the Domestic Violence Clause's recognition of substantive limitations on congressional power, the Court should not merely rubber-stamp congressional assertions of the power to enact controls over violent crime. It should instead presume that such assertions of power go beyond Congress' limited authority.

* * *

There can be little doubt that, in enacting VAWA and the crime of "interstate domestic violence," Congress meant to exact a change in the federal-state division of power. In *Brzonkala*, the *en banc* Fourth Circuit discussed at length VAWA's far-reaching implications for federalism:

> [W]hen the federal government provides a remedy for violent crime in addition to that provided by the States, it both involves itself in the punishment of such crime and increases the total penalty for such crime beyond that provided by the law of the States. Morever, this federal involvement will inescapably lead to changes in the allocation of state law enforcement and judicial resources, and even in substantive state law, by altering the underlying enforcement realities against which all such allocative and legislative decisions are made.

Brzonkala v. Virginia Polytechnic Institute, No. 96-1814 (*en banc*), slip op. at 33 (4th Cir. 1999) (footnote omitted).

In this case, federal prosecutors took control over the defendant *after* New York state authorities had arrested her. Petition for a Writ of Certiorari, p. 3. The facts of this case thus confirm the Fourth Circuit's impression that VAWA will effect a change in the allocation of resources that states devote to violent crime, an area where they retain *primary responsibility* under the Constitution. Accordingly, the Court should review the constitutionality of the crime of "interstate domestic violence," presuming, under the premises of the Domestic Violence Clause, that federal power does not include the power to regulate and control violent crime.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

RITA GLUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Brief of Amicus Curiae Connecticut Criminal Defense Lawyers Association In Support of the Petition

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INTEREST OF THE AMICUS

Amicus curiae respectfully submits this brief in support of the petition for writ of certiorari to the Second Circuit.[1] *Amicus curiae* Connecticut Criminal Defense Lawyers Association is a bar organization comprised of lawyers who practice criminal law in Connecticut, in both federal and state court.

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1 Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

Amicus curiae has a substantial interest in supporting the petition for certiorari. This case involves the federalization of domestic relations assaults, an area of criminal law that has been reserved to the states since the founding of this nation. The decision below, which upholds the statute's constitutionality on the basis that it requires that the defendant travel across state lines, is, in the view of *amicus*, the most expansive application of Congress' Commerce Clause authority to date. If allowed to stand, the Second Circuit ruling paves the way for the unlimited federal police power that this Court's *Lopez* decision was designed to prevent. Review of the decision in this case will clarify the scope and meaning of the Court's decision in *Lopez*, and will provide needed guidance to the lower courts and to the criminal defense bar.

In addition, *amicus curiae* has a substantial interest in addressing the increasing damage that the pattern of "federalization" of traditional state court offenses is inflicting upon the federal court system. This trend has given federal prosecutors virtually unlimited and unreviewable discretion to select a minute percentage of defendants involved in typical state court offenses, and "federalize" those select cases. This burgeoning pattern has clogged the federal courts with traditional state court prosecutions, which state prosecutors are well-equipped to handle. This has diverted valuable federal court resources away from areas of clear national concern, and increased the arbitrariness of decisions regarding the proper forum for criminal offenses.

The Violence Against Women Act of 1994 is a prime example of this disturbing trend. It federalizes prosecutions which have traditionally been handled by the state courts, and does so based entirely on the fortuitous crossing of state lines. It disrupts the federal-state balance in the area of law enforcement, encourages forum shopping by prosecutors, and leads to arbitrary results in similar cases. Review of this case will

resolve a split in the circuits, provide needed guidance to the lower courts, and afford the Court an opportunity to provide further amplification on the essential holding of *Lopez:* that there are cognizable limits to the federal police power, and that those limits are essential to maintain a proper state-federal balance.[2]

SUMMARY OF ARGUMENT

The Second Circuit's decision in this case should be reviewed for several reasons. First, there is now a split in the circuits regarding the constitutionality of the Violence Against Women Act, as a result of the Fourth Circuit's *en banc* ruling in *Brzonkala v. Virginia Polytechnic Institute*, Slip op. (4th Cir. March 5, 1999), and it is a split which mandates speedy resolution by this Court. Second, this case affords the Court an opportunity to provide much-needed guidance to the federal courts regarding the scope, meaning, and proper application of *United States v. Lopez*, 514 U.S. 549 (1995). Third, assuming *arguendo* that Congress has some limited authority to legislate in the area of domestic relations, this case is the ideal vehicle for resolving the question of whether Congress can so legislate, consistent with the Commerce Clause, by merely adding a requirement of "crossing state lines" to a non-commercial offense which has no substantive connection to interstate travel.

The lower court decisions in this case uphold this statute on the basis that the insertion by Congress of the requirement that a defendant charged with violating 18 U.S.C. § 2261 "travels across a state line" is sufficient under the Commerce Clause. If allowed to stand, the decision below will result in virtually no limits on Congress' power to "federalize" offenses which have traditionally been within the exclusive province of state courts.

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2 The petitioner has consented to the filing of this brief, and the request for consent is pending with the Office of the Solicitor General at the time of the printing of this brief.

decision in *Lopez*, but would conflict directly with the clear holding in *Lopez* that the federal police power is not unlimited (if government's arguments in *Lopez* were accepted, "we are hard-pressed to posit any activity by an individual that Congress is without power to regulate"). *Lopez*, 514 U.S. at 564. Moreover, if there is any area in which the federal police power should be limited, it is in the context of domestic relations laws, an area of law consistently left to the purview of the states. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

ARGUMENT

I. THE SPLIT IN THE CIRCUITS REGARDING THE CONSTITUTIONALITY OF VAWA WARRANTS REVIEW BY THIS COURT.

While the constitutionality of VAWA has previously been the subject of substantial disagreement among judges and legal commentators, the recent Fourth Circuit decision in *Brzonkala* creates a circuit split regarding the constitutionality of this statute. In contrast to the Second Circuit *per curiam* decision in this case, which failed to address the issues meaningfully and relied entirely upon the lower court's analysis, the *en banc* 7-4 decision in *Brzonkala* contains a detailed analysis of the statute's constitutionality. The *Brzonkala* majority decision, unlike numerous decisions subsequent to this Court's *Lopez* decision, rejects the government's consistent efforts to relegate that decision to an aberrational footnote in Commerce Clause jurisprudence. Slip op. 6. The *Brzonkala* majority points out that the arguments supporting the statute, if adopted, would "convert the power to regulate interstate commerce into a general police power." Slip op. 28.

The split between the approaches taken by the Second and Fourth Circuits is reflective of the sharp division within the judiciary and among legal commentators regarding the

constitutionality of VAWA. *See, e.g., United States v. Wright*, 965 F.Supp. 1307, 1309-16 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1376 (1998) (Magistrate Judge and District Court conclude VAWA unconstitutional, reversed by Eighth Circuit); Houck, *VAWA After Lopez: Reconsidering Congressional Power Under the Fourteenth Amendment in Light of Brzonkala v. Virginia Polytechnic and State University*, 31 U.C. DAVIS L. REV. 625, 652 (1998) ("If *Lopez* even slightly limits Congress's power under the Commerce Clause, VAWA is an illegitimate exercise of the Commerce Clause power"); Carroll, *Women's Powerlessness Tool: How Congress Overreached the Constitution with the Civil Rights Remedy of the Violence Against Women Act*, 30 J. MARSHALL L. REV. 803, 828 (1997) (VAWA "fails to pass constitutional muster under the Commerce Clause"); but see, Winskie, *Can Federalism Save the Violence Against Women Act?*, 31 GA. L. REV. 985, 1012 (1997) (predicting that VAWA will be upheld as constitutional "due to the federal courts' hesitance to apply strictly the *Lopez* framework"); Schick, *Breaking the "Rule of Thumb" And Opening the Curtains - Can the Violence Against Women Act Survive Congressional Scrutiny?*, 28 U. TOL. L. REV. 887, 894 (1997) (predicting that VAWA will be upheld as constitutional "due to the federal courts' hesitance to apply strictly the *Lopez* framework"). The majority and dissenting opinions in *Brzonkala* themselves reflect the clear divergence of opinion, and also underscore the importance of the conflict, the issues involved, and the need for resolution by this Court.

II. REVIEW OF THE DECISION BELOW WOULD ALLOW THE COURT TO PROVIDE NEEDED GUIDANCE REGARDING THE MEANING AND APPLICABILITY OF LOPEZ.

While it initially appeared that *Lopez* would have a significant impact upon the approach taken by the federal judiciary (and in turn Congress) to the rampant federalization of

traditional state offenses, to a large degree that has not occurred. The unwillingness of the lower courts to apply *Lopez* is exemplified by the separation of the Category III *Lopez* analysis from Category I (statutes regulating the "channels" of interstate commerce) and Category II (statutes regulating the "instrumentalities" of interstate commerce) analysis. The district court decision in this case reflects the tendency to restrict *Lopez* only to cases involving intra-state activities: "*Lopez*, however, was concerned only with the third category of activity, and did not purport to affect Congress' exercise of its commerce power with regard to the regulation of the use of the channels or instrumentalities of commerce". Cert. Pet. at 10a-11a. As an initial matter, this analysis appears wrong. The constitutional issue is the applicability of the **Commerce** Clause; the requirement is not one of mere interstate travel, but rather interstate **commercial** activity.

The decision below conflicts with prior decisions of the Second Circuit in which cases labeled as Category I or II have been analyzed, and a connection to commercial activity was required. For example, in *United States v. Trupin*, 117 F.3d 678 (2d Cir. 1997), *cert. denied*, 118 S.Ct. 699 (1998), the court upheld the constitutionality of 18 *U*.S.C. § 2315 under Category I. The court upheld the statute on the ground that it was "'a regulation of the use of the channels of interstate commerce' because it is 'an attempt to prohibit the interstate transportation of a commodity through the channels of commerce'" (citation omitted). Similarly, in *United States v. Wright*, 965 F.Supp. 1307, 1309-16 (D. Neb.), *rev'd*, 128 F.3d 1274 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1376 (1998), the court determined that the Child Support Recovery Act was a Category II offense, and that it was constitutional because it was a statute that dealt with commerce. The court analyzed the issue at length, citing numerous cases defining commerce and holding that the statute in question dealt with financial transactions and implicated commerce ("Because it presupposes an order of a State court imposing an obligation to pay money, the Act concerns transactions related to economic activity"). *Sage*, 92 F.3d at 107.

The confusion regarding whether a commercial nexus is required for *Lopez* Category I and II analysis has led to the decision here. The instant statute has nothing whatever to do with commercial activity, and the decision below appears to hold that interstate travel by any person under any circumstances by definition constitutes interstate commerce. If Category I and II can be construed in such a broad manner, however, then the apparent limitations upon federal jurisdiction established in *Lopez* are illusory. Indeed, if statutes falling within Category I or Category II can focus upon non-commercial activity, then Congress could "federalize" an entire state criminal code merely by engrafting upon each statute the requirement that a defendant "cross state lines" before committing the offense.[3] Such a result would render meaningless this Court's decision in *Lopez*, and it truly would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States have historically been sovereign." *Lopez*, 514 U.S. at 564.

Unfortunately, many post-*Lopez* decisions do push the Commerce Clause analysis in this direction, and resolution of the issue in this case would provide much-needed guidance. *See, e.g.*, *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995) (2-1 vote), *aff'd*, 105 F.3d 997 (*per curiam*) (*en banc*), *cert. denied*, 118 S. Ct. 47 (1997) (even split of Fifth Circuit, affirming constitutionality of 18 U.S.C. § 922(o), which prohibits the possession or transfer of a machine gun); *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997) (18 U.S.C. § 228 [failure to pay child support for child in another state] targets the "instrumentalities" of interstate commerce; dissenting judge

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3 The inclusion of an intent element in § 2261 is of no consequence to the decision here, as the holding below rests exclusively upon the crossing of a state line. The insertion of an intent element does not render the activity commercial, and is irrelevant to the Commerce Clause analysis.

notes that under this approach, "any person moving to another state ipso facto federalizes all of his financial obligations, and 'utilizes' the channels of interstate commerce, merely by crossing a state line"). In the absence of clarification, this split will undoubtedly continue, with the government increasing its efforts to place a statute in Category I or II, Congress passing statutes that contain an interstate travel element but relate to non-commercial activity, and the lower courts avoiding the *Lopez* analysis by pigeon-holing statutes into Category I or II. This case presents an unambiguous opportunity for the Court to clarify the meaning and scope of *Lopez*. Given the significance of the issue, the split in the circuits, and the uncertainty regarding how *Lopez* is to be applied, review is of critical importance.

III. THE REQUIREMENT THAT A DEFENDANT CROSS A STATE LINE IS INADEQUATE TO ESTABLISH FEDERAL JURISDICTION.

The court below held that since the statute contains the element that a defendant cross state lines before committing the substantive offense, it passes muster under the Commerce Clause. That decision is erroneous, and if not reviewed, will constitute a substantial step toward obliteration of the "sensitive relation" between "what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 557, 560 at n. 3

There can be little doubt that assaults and/or murders in the domestic relations context are about as far removed from "commercial activity" as is possible. Murders in general have historically been prosecuted in state and not federal court, and Congress has "no general right to punish murder." *Cohens v. Virginia*, 19 U.S. 264 (1821). This longstanding reality is most applicable in the context of domestic relations assaults, which are almost always fueled by heated emotions and are the quintessential crimes of passion.

Insertion of the "crossing state lines" element in no way obscures this reality, and non-commercial offenses containing such a requirement do not fall within the federal police power. The fundamental flaw in the decision below is that interstate movement of a defendant is equated with interstate commerce. That flawed construction reduces the phrase "interstate commerce" to redundancy, and renders meaningless the phrase "commerce." It ignores the reality that commerce "describes the commercial intercourse between ... parts of nations ... and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824).

The conclusion that a statute containing the element of "crossing state lines" is facially valid under the Commerce Clause, without further analysis of the commercial or non-commercial character of the offense, appears to be based upon an overly broad interpretation of prior decisions of this Court, such as that in *Caminetti v. United States*, 242 U.S. 470 (1917). In *Caminetti*, the Court held that transportation of passengers in interstate commerce for illicit purposes is within the regulatory power of Congress. *Caminetti*, however, did not hold that crossing state lines itself constitutes interstate commerce. Indeed, the Court assumed in *Caminetti* that Congress could **not** prohibit a person from crossing state lines with the intent to commit an offense: "It may be conceded, for the purpose of the argument, that Congress has no power to punish one who travels in interstate commerce merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey". 242 U.S. at 491. *Caminetti* simply does not support the conclusion that any federal offense which requires interstate travel falls within the Commerce Clause.

The lower court's reliance upon *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), is similarly misplaced. The Court there evaluated the Civil Rights Act of 1964, which it found met Commerce Clause requirements because the statute

reached only business enterprises that had a direct and substantial relationship to the interstate flow of goods and people. The decision there that discrimination by hotels and motels impedes interstate travel hardly gives legitimacy to the claim that all interstate travel necessarily subjects the individual traveler to federal criminal jurisdiction.

The district court below concluded that *Lopez* does not have any impact upon statutes in which Congress "seeks to regulate persons or things in interstate commerce," Cert. Pet. at 13A, and the Second Circuit adopted that holding. Cert. Pet. at 2A. It is this holding which must be reviewed, as it leads precisely to the unlimited police power rejected in *Lopez*. Review in this case will enable this Court to determine whether insertion of the talismanic "crossing state lines" requirement insulates a statute from Commerce Clause analysis and *Lopez*. If *Lopez* is to retain any vitality, it is imperative that the Court grant review in this case.

In *Lopez*, this Court emphasized that the scope of Congress' interstate commerce powers

> 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'

Lopez, 514 U.S. at 557, quoting *Jones & Laughlin Steeel*, 301 U.S. 1, 37 (1937). The lower courts in this case have effectively ignored the holding of this Court in *Lopez*, and review of this case will resolve a split in the circuits, address an issue of major national importance, and clarify the present status of Commerce Clause jurisprudence.

CONCLUSION

For the reasons stated above, the Court should grant the petition for review of the Third Circuit's decision.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1998

RITA GLUZMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS*

Amicus Curiae, the Cato Institute, respectfully submits this brief in support of the petition for writ of certiorari to the Second Circuit.[1] The Cato Institute is a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited, constitutional government. To further those ends, Cato Institute scholars have published numerous works discussing the importance of the constitutional doctrine of enumerated powers in our federal system and, in particular, the proper scope and limits of national power under the Commerce Clause (U.S. Const. art. I, § 8, cl. 3). *E.g.*, Pilon, *Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles*, 68 NOTRE DAME L. REV. 507 (1993); Reynolds, *Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?* CATO INSTITUTE POLICY ANALYSIS NO. 216, Oct. 10, 1994; Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996).

Amicus Curiae has a substantial interest in supporting the petition for certiorari because the appellate court's decision upholding a federal criminal statute governing "interstate domestic abuse," 18 U.S.C. § 2261(a)(1), conflicts with this Court's ruling in *United States v. Lopez*, 514 U.S. 549 (1995), and will, if left standing, permit Congress to regulate wholly non-commercial criminal conduct,

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

including all manner of street crime, thus usurping the traditional authority of states and localities over their own domestic law enforcement, with profound long-term consequences for liberty and limited government in the United States. This brief will discuss some of the consequences of overriding constitutional restraints to allow Congress a general police power over non-commercial crime.

SUMMARY OF THE ARGUMENT

The Opinion of the Court and the concurring opinions in *United States v. Lopez*, 514 U.S. 549 (1995), establish that only commercial activities are subject to Congress's authority under the Commerce Clause. Despite that restriction, the Second Circuit in the present case upheld a criminal statute that governs the wholly non-commercial conduct of spousal abuse, relying on the fact that the statute also requires incidental interstate travel. The ruling below ignores the limitations inherent in the plain language of the Commerce Clause, and also conflicts with the restrictions of the Domestic Violence Clause (art. IV, § 4), which permits the national government to address violence within a state only upon petition from the endangered state.

If allowed to stand, the Second Circuit's ruling will undermine the local control and accountability that the Framers intended for the dangerous powers of law enforcement, and will threaten individual rights by permitting federal authorities to circumvent the rights of

citizens under their own states' laws, while also eviscerating the doctrine of enumerated powers – liberty's first line of defense against an overweening central government.

ARGUMENT

I. THE SECOND CIRCUIT INCORRECTLY RULED THAT THE COMMERCE CLAUSE GIVES CONGRESS POWER OVER THE WHOLLY NON-COMMERCIAL CRIMINAL CONDUCT OF DOMESTIC ABUSE

A. *Lopez* Held That Congress May Regulate Only Commercial Activities Under The Commerce Clause

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that Congress's power "to regulate Commerce * * * among the several states" (U.S. Const. art. I, § 8, cl. 3), reaches only *commercial* activities, which may be interpreted to include a variety of economic undertakings but cannot be unleashed from the moorings of the operative word "commerce" to cover all manner of human conduct outside the realm of business and trade, and on that basis struck down a statute making it a federal crime to possess a gun in a school zone, 18 U.S.C. § 992(q). As explained below, the central holding of *Lopez* – that Congress's power under the Commerce Clause must at least be restricted to *commercial* activity – animates the majority opinion of Chief Justice Rehnquist and the concurring opinions of Justices Kennedy and Thomas. But the Second Circuit's ruling in the present case expands the

bounds of the Commerce Power beyond commercial activities and thereby guts this Court's ruling in *Lopez*.

1. The Opinion of the Court

In the Opinion of the Court in *Lopez*, Chief Justice Rehnquist wrote: "We start with first principles. The Constitution creates a Federal Government of enumerated powers." 514 U.S. at 552. Quoting James Madison, " '[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' " *Id.* (quoting THE FEDERALIST NO. 45, at 292-293 (C. Rossiter ed. 1961)). Thus, " '[u]nder our federal system, the administration of criminal justice rests with the States except as Congress, acting within the scope of [its] delegated powers, has created offenses against the United States.' " 514 U.S. at 561 n. 3 (quoting *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion)).

The commerce power delegated to Congress " 'is the power to regulate; that is, the power to describe the rule by which *commerce* is to be governed.' " 514 U.S. at 553 (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L.Ed. 23 (1824)) (emphasis added). Whatever other limits may exist,[2] any criminal statute passed under the commerce power must be shown at least to govern *commercial* activity if it is to pass constitutional muster; thus, in *Lopez* this Court struck down the Gun-Free School Zones Act

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[2] Other limits on the Commerce Power are discussed in, for example, Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

because "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561.

In striking down the Act, the Court specifically rejected the contention of dissenting Justice Breyer that "commerce" is a broad and amorphous term, and that therefore "Congress could rationally conclude that schools fall on the commercial side of the line" because they provide children with training to participate in the workplace and thereby affect commerce. *Id.* at 565. According to the Court, "Justice Breyer's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial;" for example, family law and child rearing could be said to have the same potential to affect commerce through the future productivity of children. *Id.* at 565-566. The Court then acknowledged its responsibility to determine, on a case-by-case basis, whether a given subject of congressional regulation is indeed "commercial" in order to restrict Congress to "those powers enumerated in the Constitution." *Id.* at 566.

2. The Concurring Opinions

The concurring opinions in *Lopez* placed even greater emphasis on the touchstone of the Court's ruling – that only commercial activities are subject to Congress's authority under the Commerce Clause. For example, Justice Kennedy stressed that "the essential principles now in place" recognize "the congressional power to regulate transactions of a *commercial nature*." *Id.* at 574 (Kennedy,

J., concurring) (emphasis added). Justice Kennedy explained that the Framers intended the states to have exclusive power over their customary areas of responsibility (such as schools, families, and crime) to assure that citizens would have some means of knowing whom to hold accountable for failure to perform a given function, and therefore stressed that the commerce power delegated to Congress should not be interpreted so broadly as to intrude in those areas:

> Were the Federal Government to take over the regulation of entire areas of traditional state concern, *areas having nothing to do with the regulation of commercial activities*, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

Id. at 577 (citations omitted) (emphasis added). Thus, according to Justice Kennedy, a statute passed under the Commerce Clause cannot stand "unless Congress can * * * demonstrate its *commercial character*." *Id.* at 580 (emphasis added).

Likewise, in his concurring opinion, Justice Thomas emphasized that, at the very least, Congress must be limited to addressing activities of a commercial character under the commerce power:

> Notwithstanding Justice Souter's discussion [in dissent], 'commercial' character is not only a natural but an inevitable ground of *Commerce* Clause distinction. Our invalidation of the Gun-

> Free School Zones Act therefore falls comfortably within our proper role in reviewing federal legislation to determine if it exceeds congressional authority as defined by the Constitution itself.

Id. at 601 n. 9 (citations omitted) (emphasis in original).

B. The Domestic Violence Clause Requires That Congress Act Only Upon Petition From A State Seeking Protection Against Domestic Violence

The reach of § 2261(a)(1) of the Violence Against Women Act must be retracted not only to vindicate the plain language of the Commerce Clause, but also to abide by the limitations inherent in the Domestic Violence Clause of Article IV, Section 4, which provides: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and *on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.*" (Emphasis added).

Recent scholarship has revealed that in the Framers' understanding, "[e]very pretext for intermeddling with the domestic concerns of any state, under colour of protecting it against domestic violence is taken away, by that part of the provision [art. IV, § 4] which renders an application from the legislative, or executive authority of the state endangered, necessary to be made to the federal government, before it's [sic] interference can be at all proper." Bybee, *Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1, 4 n. 13 (quoting

St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the federal Government of the United States; and of the Commonwealth of Virginia app. at 367 (photo. reprint 1996) (1803)). The Domestic Violence Clause thus reinforces the principle already inherent in the enumeration of powers in the Constitution – that Congress, in enacting criminal legislation, must confine itself to subjects within its specifically delegated powers to avoid intermeddling in the domestic affairs left for the states to address.

C. The Second Circuit Has Jettisoned The Restriction Of Commerce-Clause Legislation To Commercial Activity

Despite the restrictions inherent in the Commerce Clause, as understood through the doctrine of enumerated powers, the Second Circuit in the present case upheld a criminal statute – purportedly passed under the commerce power – that governs conduct as far removed from commercial activity as can be imagined, namely, "crime[s] of violence" causing "bodily injury" to a "spouse or intimate partner." 18 U.S.C. § 2261(a). While it may be true, as the Court noted in *Lopez*, that "depending on the level of generality, any activity can be looked upon as commercial," it would render the language of the Commerce Clause – and the doctrine of enumerated powers – a nullity to interpret commerce so broadly as to include spousal violence, just as it would to include possession of a gun in a school zone. 514 U.S. at 565-566.

The Second Circuit in the present case relied on the District Court's reasoning that Congress has "plenary

power" to regulate "the channels of interstate commerce," and therefore can properly reach wholly non-commercial activities such as spousal abuse through its commerce power, as long as some element of interstate travel is involved. *See* Pet. App. at 2a, 15a. But that reasoning conflicts with the central holding of *Lopez*, set forth in the Opinion of the Court and in the concurrences, that the *Commerce* Clause must at least be restricted in scope to *commercial* activity; the Court nowhere stated that the commercial focus of the power can be ignored whenever a state line is incidentally crossed.[3] The Second Circuit has nevertheless ruled that there are effectively no limitations on the subject areas Congress can reach under its commerce power, no matter how deeply its legislation may intrude into the customary realm of state and local sovereignty. That ruling, as explained below, threatens

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[3] In one of the broadest extensions of the commerce power, this Court upheld the Mann Act, governing interstate transportation of women and girls for "immoral purposes," but that statute, while broadly worded, was primarily directed at a commercial activity, the selling of sexual services, then known as "the White Slave Traffic." *Hoke v. United States*, 227 U.S. 308 (1913). In an opinion more than eighty years ago, the Court later upheld the use of that statute to punish an individual for transporting a woman to make her "his mistress and concubine" – a non-commercial activity that now appears beyond the scope of the Commerce Clause as interpreted in *Lopez*. *Caminetti v. United States*, 242 U.S. 470 (1917). Despite that incidental application, the fact remains that the Mann Act was primarily focused on commercialized vice, and therefore stretches the reach of the Commerce Clause far less than the domestic abuse statute at issue here, which has nothing at all to do with commerce.

the principles of liberty, limited government, and federalism embedded in the Constitution.

II. THE SECOND CIRCUIT'S RULING THREATENS THE SAFEGUARDS OF FEDERALISM AND INDIVIDUAL RIGHTS

A. Federal Intrusion Into Routine Law Enforcement Undermines The Local Control And Accountability Intended By The Framers.

The Court in *Lopez* stressed that the administration of criminal justice under our federal system lies within the States unless Congress, pursuant to its delegated powers, creates a federal offense. 514 U.S. at 561 n. 3. As one legal scholar recently noted in discussing the primacy of state authority over crime, "federalism is likely to be *more* important to the liberty and well being of the American people than any other structural feature of our Constitution, including the separation of powers, the Bill of Rights, and judicial review." Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 756 (1995) (emphasis in original).

State and local governments, because of their smaller size and greater proximity to the citizens they police, can be more easily monitored and may be able to enforce the law less intrusively than the federal government could:

> [I]t often makes sense to lodge dangerous and intrusive police powers over crime and other controversial social issues in the states, where government officials may be monitored more easily by the citizenry. Conversely, state governments also may find that they are able to enforce

> criminal laws and regulations of social mores less coercively than the national government because of the lower costs and greater ease of monitoring citizen behavior in a smaller jurisdiction.

Id. at 778.

Moreover, state and local governments by their nature will be more responsive to local tastes, priorities, and conditions than the national government, and therefore better able to work within communities in implementing anti-crime strategies. *Id.* at 775. Indeed, the Police Executive Research Forum has criticized the trend of federalizing routine crime because it "diverts federal authorities from what they do best and puts more distance between law enforcers and local community residents – in direct conflict with community policing objectives." Police Executive Research Forum, *Position on Federalism*, quoted in, AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998) at 41 n. 72; *see also*, *Lopez*, 514 U.S. at 682 (Kennedy, J., concurring) ("injection of federal officials into local problems causes friction and diminishes political accountability of state and local governments") (citing Brief for National Conference of State Legislatures as *Amicus Curiae* 26-30).

Finally, as the "laboratories of democracy," state and local governments can experiment with alternative approaches to crime control, and competition among states can encourage innovation and efficiency, but that process will be short-circuited if the national government, unleashed from its enumerated powers, imposes uniformity through centralized command-and-control. *Lopez*,

514 U.S. at 1641 (Kennedy, J., concurring) ("the statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which states lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of the term").

The "interstate domestic abuse" statute at issue in the present case implicates many of the problems with federalizing crimes traditionally subject to state control. "Domestic violence is an exceedingly complex problem, presenting many unique challenges," so states have developed multifaceted resources and mechanisms to address the problem, including civil protection orders, tort remedies, criminal statutes, and child-custody provisions. *See* Klein and Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (1993). Experts stress that domestic violence requires a "coordinated community response" from local authorities, linking county prosecutors, local police and sheriffs, social service agencies, housing assistance agencies, and others in coherent and consistent strategies to punish offenders and provide for the needs of the victims. Griffith, *Lessons in Collaboration from Local Domestic Violence Councils*, 33 WILLIAMETTE L. REV. 931, 934-938 (1997). Prosecution and incarceration of the offenders can play a critical role, but selecting the response best for the victims is complicated by the fact that victims are often economically dependent on the perpetrators, and may end up destitute or homeless if suddenly cut off from financial support. Klein and Orloff, *supra*, 21 HOFSTRA L. REV. at 990-1004.

Federal agents and prosecutors are an alien and potentially disruptive presence in this area of comprehensive state authority; indeed, one commentator who applauds the contribution of federal funds to efforts to address domestic violence has nevertheless criticized the accompanying federal criminal statutes because of pessimism about "the ability of federal law enforcement to do the kind of on-site policing that the federal criminal system has never been any good at." Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1516 at n. 38 (1998). While "[f]ederalizing domestic violence crimes caters to public sentiment to 'get tougher,' " in the end "it is likely to distract attention away from local law enforcement, duplicating and wasting resources and not much else." *Id.* In blurring the lines of governmental responsibility for prosecuting domestic abuse, federal legislation could potentially exacerbate the problems of neglect and lack of accountability that critics have found in the response of some state and local authorities. *E.g., id.* at 1506. And the local U.S. Attorney and federal agents, unlike the county prosecutor and sheriff, never have to stand for election by the people they serve, so their neglect and errors are not subject to electoral accountability.

Those problems illustrate the wisdom of the Framers in leaving crime control generally in the hands of state and local governments, subject only to narrow incursions of federal power to address truly national problems, for which Congress has been delegated specific authority. The Commerce Clause should not be stretched beyond its bounds – as the Second Circuit has stretched it – to

swallow up traditional areas of state authority such as domestic abuse.

B. Federal Duplication Of State Criminal Codes Threatens Individual Rights.

The passage of the federal statute governing "interstate domestic abuse" is part of a trend in which Congress has been duplicating state offenses in the federal criminal code, particularly on "hot-button" issues suitable for political posturing. See AMERICAN BAR ASS'N, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW (1998) at p. 2. That expansion of federal authority into areas the Framers never intended undermines many aspects of the constitutional structure they designed, throwing the system out of balance in ways that threaten individual rights and liberty.

For example, the Framers of the Bill of Rights intended that no person should "be subject for the same offence to be twice put in jeopardy of life or limb," meaning that a person cannot be punished twice or prosecuted after an acquittal for the same crime. U.S. Const. amend. V. But this Court has ruled that a state prosecution will not bar a subsequent federal prosecution for the same conduct, because the state and federal governments are "separate sovereigns" with distinct interests to protect. *Abbate v. United States*, 359 U.S. 187 (1959). The "separate sovereign" doctrine would not often compromise the constitutional protection against double jeopardy if the federal government were restricted to its enumerated powers and created federal crimes only to address the genuinely national issues within its authority.

But the duplication of state criminal codes, exemplified in the "interstate domestic abuse" statute, threatens to render double-jeopardy protections meaningless.

Moreover, the federalization of state crimes may deprive the accused of rights and procedural protections afforded by state law but not applicable in federal prosecutions. For example, states may provide broader protections against entrapment, broader rights to pretrial discovery, and even a broader right to counsel. *See* KAMISAR, LAFAVE, AND ISRAEL, MODERN CRIMINAL PROCEDURE 49, 392-97, 1128-36 (7th ed. 1990). Federal duplication of state criminal codes creates the potential for those rights and protections to be circumvented by the simple expedient of prosecution in federal rather than state court. Indeed, the Petitioner in this case has cited evidence that she was prosecuted in federal court in part so that New York's requirements for corroboration of accomplice testimony could be avoided. Pet. at p. 24.

But perhaps most importantly, the demise of the doctrine of enumerated powers would leave all individual rights in jeopardy because it would eliminate the Constitution's first line of defense against an overweening central government. The Bill of Rights was added to the Constitution as a "back-up" system, but the primary protection was meant to reside in the enumeration and hence limitation of powers. As one scholar has noted, "[t]here is no reason to believe * * * that the Bill of Rights itself will survive over the long term if the rest of the plan is abandoned. As National Aeronautics and Space Administration engineers say, once you start relying on the backup systems, you are already in trouble." Reynolds, *supra*, CATO INSTITUTE POLICY ANALYSIS NO. 216, Oct. 10,

1994, at p. 28. The Second Circuit's ruling in this case threatens to unleash the national government from the doctrine of enumerated powers, leaving the Bill of Rights as the only restraint on central power. Sooner or later, that restraint is bound to fray and break.

CONCLUSION

This Court should grant the petition for certiorari and reverse the Second Circuit's decision.

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In The

Supreme Court of the United States

October Term, 1998

RITA GLUZMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. ("Southeastern") respectfully submits its brief as *amicus curiae* in this case in support of the petition for writ of certiorari to the Second Circuit.[1] The parties have consented to the filing, and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving matters of significant public concern. Dedicated to economic and social progress through the equitable administration of law, Southeastern presents the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Towards that end, Southeastern has appeared before this Court on behalf of appellees in *Clinton v. Glavin* decided *sub nom. Department of Commerce v. United States House of Representatives*, ___ U.S. ___, 119 S. Ct. 765 (1999), and has participated as *amicus curiae* in a number of cases before this court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982). Southeastern seeks to promote a limited federal government and proper respect for State functions in our federal system of divided government believing these to represent the surest safeguard of individual liberty.

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[1] Pursuant to Supreme Court rule 37.6, *amicus curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Amicus Southeastern adopts the statement of the case contained in the brief of Petitioner.

SUMMARY OF ARGUMENT

The ruling of the Second Circuit in Rita Gluzman's case ignores the limits on Congress's Commerce Clause powers imposed by Our Federalism and intrudes on matters of criminal law and domestic relations that properly belong only to the States. Intercircuit conflicts over the constitutionality of the Violence Against Women Act urge granting of certiorari in Petitioner's case to resolve two issues of recurring significance. The first is the lack of sufficiently clear standards in this Court's decision in *United States v. Lopez*, 514 U.S. 549 (1955), to enable lower courts to afford appropriate judicial review of cases challenging congressional power to criminalize conduct essentially local in character. The second is the continued vitality of *Caminetti v. United States*, 242 U.S. 470 (1917), which is inconsistent with *Lopez* and should be overruled. These steps of clarification and the overruling of *Caminetti* can only come from this Court.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE SECOND CIRCUIT'S RULING IN ORDER TO PROTECT IMPORTANT VALUES OF OUR FEDERALISM

A. The Second Circuit's Ruling Ignores The Limits Imposed On Congress's Commerce Clause Powers By Our Federalism

It is important for this Court to clarify the principles established in *United States v. Lopez*, 514 U.S. 549 (1995)

both to allow their effective application and enforcement by lower federal courts and state courts and to protect the values of Our Federalism. Petitioner's case offers an important, timely, and appropriate opportunity for the Court to undertake that clarification.

Our Federalism is bottomed on a division of authority between the national government and the States as well as among the three branches of the federal government. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.") (internal quotation marks omitted); see also, The Federalist No. 45. Justice Black aptly described Our Federalism as

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,' and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of 'Our Federalism.' The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government

> and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

Younger v. Harris, 401 U.S. 37, 44 (1971).

Our Federalism is most challenged by the modern expansion of congressional power under the Commerce Clause through its use to criminalize conduct essentially local in character and, in many instances, already the subject of local criminal penalties. As this Court warned in *NLRB v. Jones & Laughlin Steel Corp.*, congressional exercises of the commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U.S. 1, 37 (1937). In *United States v. Lopez*, this Court set standards that would fence off appropriate congressional applications of the Commerce Clause from unconstitutional ones by identifying "three broad categories of activity that Congress may regulate under its commerce

power." *Lopez* at 558. Thus, Congress may (1) "regulate the use of the channels of interstate commerce"; (2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) may "regulate those activities having a substantial relation to interstate commerce" or which "substantially affect interstate commerce." *Lopez* at 558-9.

These categories have proven difficult for courts to apply. For example, in Petitioner's case the Government has variously argued that the portion of the Violence Against Women Act of 1994 ("VAWA")(Pub.L. No. 103-322, §§ 40001-40703) under which she was convicted, 18 U.S.C. § 2261(a)(1), can be justified under all three *Lopez* categories. What is apparent from this is that the categories are not clear enough to protect the vital interests of Our Federalism at stake, not only in this case, but under other statutes in which Congress seeks to criminalize conduct which is properly the subject of state law-making. All evidence points to an alarming growth in such federal law-making which threatens Our Federalism.

B. The Nationalization Of Criminal Law Matters More Properly Within State Authority Damages Our Federalism

The recent report of the Task Force on the Federalization of Criminal Law by the American Bar Association's Criminal Justice Section "The Federalization of Criminal

Law" (1998) documents the institutional damage to Federalism wrought by Congress's failure to respect the proper limits of its Commerce Clause authority:

> [1] It . . . undermines the state-federal fabric and disrupts the . . . constitutional balance of federal and state systems. [2] It can have a detrimental impact on the state courts, state prosecutors, attorneys, and state investigating agents who bear the overwhelming share of responsibility for criminal law enforcement. [3] It has the potential to relegate the less glamorous prosecutions to the state system, undermine citizen perception, dissipate citizen power, and diminish citizen power, and diminish citizen confidence in both state and local law enforcement mechanisms. [4] It creates an unhealthy concentration of policing power at the federal level. [5] It can cause an adverse impact on the federal judicial system. [6] It creates inappropriately disparate results for similarly situated defendants, depending on whether their essentially similar conduct is selected for federal or state prosecution. [7] It increases unreviewable federal prosecutorial discretion. [8] It contributes, to some degree, to costly and unneeded consequences for the federal prison system. [9] It accumulates a large body of law that requires continually increasing and unprofitable Congressional attention in monitoring federal criminal statutes and agencies. [10] It diverts Congressional attention from a needed focus on that criminal activity which, in practice, only federal prosecutions can address. [11] Overall, it represents an unwise allocation of scarce resources needed to meet the genuine issues of crime.

Task Force on the Federalization of Criminal Law by the American Bar Association's Criminal Justice Section, "The Federalization of Criminal Law" (1998), p. 50 (hereinafter "ABA Report").

All evidence points to the fact that the trend of inappropriate federalization of crime is "growing, not slowing." ABA Report, p. 11. Indeed, the federalization of crime is undergoing tremendous growth.[2]

C. Only Judicial Clarification Can Empower Lower Federal and State Courts To Effectively Police The Limits Of Our Federalism

The constitutional doctrine of Our Federalism has in the past exerted a restraining influence on Congress, "a principle enunciated by Abraham Lincoln in the nineteenth century, and Dwight Eisenhower in the twentieth century [that] matters that can be adequately handled by states should be left to them, matters that cannot be so handled should be undertaken by the federal government." Chief Justice William H. Rehnquist, The 1998 Year-End Report of the Federal Judiciary.[3] While departures

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[2] "More that 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970." ABA Report, p. 7 (Italics omitted). The Report continues: "Much though not all, of this surge has occurred in the last two decades. Even excluding provisions enacted in the last Congress . . . , more than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within a sixteen year period since 1980." ABA Report, p. 7 n. 9.

[3] Also quoted in Remarks of Chief Justice William H. Rehnquist, American Law Institute Annual Meeting, Mayflower Hotel, May 11, 1998. See, http://www.uscourts.gov/ALI.htm.

from this Lincoln-Eisenhower maxim do not reach the level of a constitutional norm, they do illustrate the need for more precise guidance in the application of the *Lopez* rule when Congress strays too far from the implicit limits in our constitutional structure. Guidance from this Court is demanded because of the loss of the maxim's doctrinal constraint and the necessity of substituting review in the courts in light of Congress's abandonment of self-restraint.

The question of whether an activity "substantially affects" interstate commerce such that it may be regulated under the Commerce Clause "is ultimately a judicial rather than a legislative question." See *Lopez*, 514 U.S. 549, 557n. 2 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring). This judicial task has proven a difficult one for want of clearer principles to aid in the application of *Lopez*.

Problems with the application of *United States v. Lopez* are amply illustrated by the difficulties of the Second Circuit in Petitioner's case. Reasoning that *Lopez* is irrelevant to congressional enactments that regulate either the "channels" or the "instrumentalities" of interstate commerce (as opposed to wholly intrastate activities that "substantially affect" interstate commerce), the Second Circuit ruled that *the mere inclusion of an interstate travel element* in 18 U.S.C § 2261(a)(1) suffices to establish the statute's constitutionality. This over-expansive and misguided reading of *Lopez* is not only erroneous, but also reflects a tendency in several lower court decisions reviewed elsewhere to restrict *Lopez* to its facts. Further review is warranted to clarify the meaning and application of *Lopez* and to define more clearly the limits of

Congress's Commerce Clause authority to federalize crimes normally the proper province of the States.

Lower court judges and academic commentators are divided over the question of whether Congress exceeded its authority under the Commerce Clause in enacting VAWA. Congress's aggressive reliance on the power, particularly in recent years, gives the matter an obvious national importance. Stark differences of opinion and an extensive literature both judicial and non-judicial assure that opposing arguments have been fully developed and strongly suggest that the issue is ripe for this Court's review.

Differences in opinion over the constitutionality of VAWA by other courts also illustrate the need for clearer guidance from this Court. At least three federal judges and one United States Magistrate have concluded that the statute exceeds Congress's authority under the Commerce Clause. In *United States v. Wright*, 965 F. Supp. 1307, 1309-16 (D. Neb.), rev'd, 128 F.3d 1274 (8th Cir. 1997), cert. denied, 118 S. Ct. 1376 (1998), Magistrate Judge Thalken found that 18 U.S.C. § 2262(a)(1), which criminalizes crossing a state line with the intent to violate a protective order (and then violating such an order), exceeds Congress's Commerce Clause authority. The court engaged in a "careful analysis" of *Lopez*, reasoning that Section 2262 "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 965 F. Supp. at 1310, 1315 (quoting *Lopez*, 514 U.S. at 561). The court rejected the government's contention that interstate travel of any kind constituted "interstate commerce," explaining that "[t]here are many ways to cross state lines without moving in the

channels of interstate commerce." *Id.* at 1314. Notably, the court also *expressly disagreed* with the district court's decision in this case. *Id.* at 1311 (explaining that district court in this case had "misconstrued Congress's power to legislate pursuant to the Commerce Clause, as limited by *Lopez*") (footnote omitted). Judge Shanahan subsequently agreed with the magistrate judge's analysis, conclusions, and criticisms of the district court's decision in this case. *Id.* at 1308 & n.1 ("disagree[ing] with the analysis found in *Gluzman*" and explaining that "[a]n interstate movement does not necessarily involve or otherwise have an impact or effect on interstate commerce"). The Eighth Circuit reversed the district court, reasoning that Section 2262(a)(1) "falls within Congress's authority 'to keep the channels of interstate commerce free from immoral and injurious uses.' " 128 F.3d at 1276 (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)). Other courts have similarly rejected Commerce Clause challenges to VAWA. *E.g., United States v. Bailey*, 112 F.3d 758, 765-66 (4th Cir.) (involving 18 U.S.C. § 2261(a)(2)), cert. denied, 118 S. Ct. 240 (1997); *Doe v. Hartz*, 970 F. Supp. 1375, 1409-23 (N.D. Iowa 1997) (42 U.S.C. § 13981), rev'd on other grounds, 134 F.3d 1339 (8th Cir. 1998); *Doe v. Doe*, 929 F. Supp. 608, 612-17 (D. Conn. 1996) (same).

In *Brzonkala v. Virginia Polytechnic Inst.*, 1999 U.S. App. LEXIS 3457, ___ F.3d ___ (4th Cir. 1999) (en banc), the Fourth Circuit held that VAWA's private right of action for gender-motivated violence, 42 U.S.C. § 13981(c), exceeds Congress's authority under the Commerce Clause as well as under § 5 of the Fourteenth Amendment. Judge Luttig's opinion in that case amply canvasses the constitutional issues applicable to VAWA.

The Second Circuit's disposition in Petitioner's case is otherwise and should be heard by this Court and reversed for the reasons set forth by the Fourth Circuit. This intercircuit conflict raises serious disparities in national policy that warrant resolution and clarification by this Court. Also, in *United States v. Page*, 136 F.3d 481 (6th Cir.), vacated and reh'g en banc granted, 143 F.3d 1049 (1998), the Sixth Circuit is weighing whether a related VAWA criminal provision, 18 U.S.C. § 2261(a)(2) (see App., *infra*, 30a-31a), violates the Commerce Clause, along with other issues of statutory construction. There have been other judicial expressions of skepticism about VAWA's constitutionality as well. See *Page*, 136 F.3d at 490 (Wellford, J., concurring) ("[F]or the reasons stated in the *Brzonkala* dissent, the constitutionality of VAWA is subject to serious question."); *Seaton v. Seaton*, 971 F. Supp. 1188, 1190-91, 1193 (E.D. Tenn. 1997) (in "quite reluctantly" upholding VAWA's civil rights provision against Commerce Clause challenge, registering "extreme discomfort with the sweeping nature of VAWA"); *Anisimov v. Lake*, 982 F. Supp. 531, 541 (N.D. Ill. 1997) (acknowledging "substantial ground for difference of opinion" about the proper resolution of the Commerce Clause issue). This pattern of cases reflects on the importance of a resolution of VAWA's constitutionality by this Court which provides adequate guidance for the resolution of future *Lopez* applications which lie ahead.

The *Lopez* standards have proven difficult for lower courts to apply. For example, federal judges have differed sharply over the constitutionality of 18 U.S.C. § 922(o), which makes it a crime to possess or transfer a machine gun that was not lawfully possessed before 1986. The

Fifth Circuit has divided 8-8 over this issue. See *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995) (2-1), aff'd, 105 F.3d 997 (per curiam) (en banc) (8-8), cert. denied, 118 S. Ct. 47 (1997). Divided panels of the Third and Sixth Circuits have rejected challenges to the statute based on *Lopez*. See *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996) (Alito, J., dissenting), cert. denied, 118 S. Ct. 46 (1997); *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996) (Suhrheinrich, J., dissenting). Likewise, judges have also reached divergent conclusions over the constitutionality of the carjacking statute, 18 U.S.C. § 2119. That law has been upheld by divided panels in the Third and Sixth Circuits. See *United States v. McHenry*, 97 F.3d 125 (6th Cir. 1996) (2-1) (Batchelder, J., dissenting), cert. denied, 117 S. Ct. 992 (1997); *United States v. Bishop*, 66 F.3d 569 (3d Cir.) (2-1) (Becker, J., concurring in part and dissenting in part), reh'g en banc denied, 73 F.3d 23, 23-24 (1995) (Becker, Nygard and Roth, JJ., voting to grant rehearing en banc). Similar judicial disagreements have occurred over the constitutionality of other federal criminal statutes. *E.g.*, *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997) (willful failure to pay child support for child who resides in a different State) (18 U.S.C. § 228) (2-1) (Smith, J., dissenting), cert. denied, 118 S. Ct. 866 (1998); *United States v. Wall*, 92 F.3d 1444 (6th Cir. 1996) (operation of an illegal gambling business) (18 U.S.C. § 1955) (2-1) (Boggs, J., concurring in part and dissenting in part), cert. denied, 519 U.S. 1059 (1997); *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995) (Freedom of Access to Clinic Entrances Act) (18 U.S.C. § 248) (2-1) (Coffey, J., dissenting). All of these disagreements reflect divergent readings of *Lopez*.

II. THIS COURT SHOULD OVERRULE *CAMINETTI V. UNITED STATES*

A major factor contributing to the failure of lower courts to adhere to the *Lopez* standards is the notion that interstate travel alone will provide a constitutionally adequate nexus with interstate commerce so to allow for federal criminalization of activities associated with it. This, of course, contradicts *Lopez*: "[T]he proper test requires an analysis of whether the regulated activity *'substantially affects' interstate commerce*." 514 U.S. 549, 559, 115 S. Ct. 1624, 1630 (emphasis added). A contributing factor to the lower court's confusion and tepid enforcement of *Lopez* is this Court's decision in *Caminetti v. United States*, 242 U.S. 470 (1917), which upheld the application of the Mann Act to private, meretricious conduct.[4] *Caminetti* is quoted in *Lopez*, 514 U.S. at 558 for the proposition that Congress's "authority * * * to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to serious question." 242 U.S. at 491. The

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[4] The Mann Act, now codified as 18 U.S.C. § 2421, made it a crime, among other things, to "knowingly transport or cause to be transported * * * in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution or debauchery, or for any immoral purpose." In *Caminetti*, this Court, by a 5-3 vote, refused to limit the application of the Mann Act to commercial vice and affirmed Caminetti's conviction for transporting a woman with the immoral purpose of making her "his mistress and concubine." The Mann Act had been upheld earlier in a case involving prostitution, a clearly commercial activity facilitated by the interstate transportation of prostitutes. *Id.* at 491-92 (citing *Hoke v. United States*, 227 U.S. 308 (1913).

settled power of Congress under the Commerce Clause to regulate "[t]he *transportation* of *passengers* in interstate commerce." 242 U.S. at 491 (emphasis added) was an important aspect of *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) from which the quotation is drawn. Furthermore, the principle that "Congress may regulate the use of the channels of interstate commerce" is likewise well settled.

The *Caminetti* Court sought to limit its scope by cautioning "that Congress has *no* power to punish one who travels in interstate commerce *merely because he has the intention of committing an illegal or immoral act at the conclusion of the journey.*" *Ibid.* (emphasis added). Experience has shown, however, that this limit cannot be respected and that *Caminetti* has been given a broader interpretation, indeed, one that clearly exceeds the limits required by *Lopez*. 514 U.S. at 564, 566 (stressing that Constitution does not create a "general federal police power"); *id.* at 567 (declaring that while "broad language" in Court's prior opinions "has suggested the possibility of additional expansion, * * * we decline here to proceed any further").[5]

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[5] Broad applications of *Caminetti* – *e.g.*, *Cleveland v. United States*, 329 U.S. 14, 20-21-22, 28 (1946) (separate opinions of Black, Jackson, Rutledge, and Murphy, JJ.) (involving Mormon polygamists) have been criticized by Members of this Court, and the Justice Department thereafter adopted a policy against prosecution in noncommercial cases unless the victims were minors. See DOJ Manual § 9-79.000 (1997); D. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 237-38 (1994). *Caminetti* and the early record of Mann Act enforcement in noncommercial cases have been harshly criticized. D. Langum, *supra*, at 9, 13 (concluding, based on review of Justice

In reaffirming and clarifying the standards of *Lopez* through Petitioner's case, this Court should reconsider whether *Caminetti* retains any contemporary vitality. Illustrating *Heart of Atlanta*'s valid point that "Congress may regulate the use of the channels of interstate commerce" with the quotation from *Caminetti* set out above perpetuates rather than attenuates the dangers of an unconstitutionally broad reading of *Caminetti*. Evidence that *Caminetti* may have outlived its time is demonstrated, for example, by its apparent conflict with the fundamental constitutional right to travel, a right recognized by this Court long after *Caminetti* was decided, see *Shapiro v. Thompson*, 394 U.S. 618 (1969), and one which this Court has continued to value. It is difficult to imagine a reading of *Caminetti* which does not unduly impinge on the fundamental right to travel interstate, especially where states have differing state laws regulating private conduct. It is readily possible for one to travel to another state for purposes which would be illicit in one's home state but allowed in the destination, e.g., *Powell v. State*, 270 Ga. 327, (1998) (unforced, private, non-commercial,

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Department records, that during the eleven-year period from 1917-28, unelected federal prosecutors conducted "a morals crusade" and using "the Mann Act as a club against blacks who dated white women and defendants who espoused unpopular political beliefs"); Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 Tex. L. Rev. 719, 736 n.108 (1996) (*Caminetti* "illustrates that the conventional citation of *Wickard v. Filburn*, 317 U.S. 111 (1942), as the extreme of federal intrusion into local matter is mistaken" because "*Wickard* at least involved commerce, federal regulation of the national wheat market; *Caminetti* involved illicit romance").

adult sexual activity is allowed by the Georgia Constitution's protection of the right of privacy).[6]

This difficulty is magnified by the contemporary language of the Mann Act which provides (without reference to where a sexual activity may be criminal):

> Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, *or in any sexual activity for which any person can be charged with a criminal offense*, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C.§ 2421 (italics added).

Overruling *Caminetti* would lay to rest this specter of violation of the fundamental right to travel which emanates from a misuse of the Commerce Clause.

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[6] *Powell* invalidated O.C.G.A. § 16-6-2(a), a law sustained against federal constitutional attack by this Court in *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (a right of privacy under the U.S. Constitution did not insulate private sexual conduct between consenting homosexual adults from state proscription).

CONCLUSION

For the reasons stated above, this Court should grant the petition for review of the Second Circuit's decision.

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